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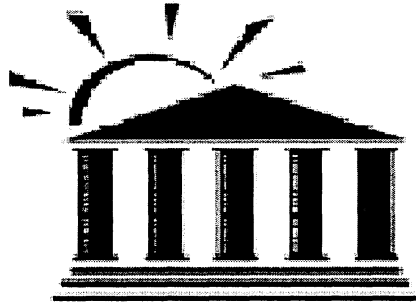
Virginia Freedom of Information Advisory Council

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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RICHMOND
2003**



**REPORT OF THE
VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**

**COMMONWEALTH OF VIRGINIA
DECEMBER 2002**

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OF THE
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REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

To: The Honorable Mark R. Warner, Governor of Virginia
and
The General Assembly of Virginia

Richmond, Virginia
December 2002

INTRODUCTION

"The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government."

--§ 2.2-3700 of the Code of Virginia
Policy Statement of the Virginia Freedom of Information Act

Established by the 2000 Session of the General Assembly¹, the Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA). As directed by statute, the Council is tasked with furnishing, upon request, advisory opinions regarding FOIA to any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA.² The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is comprised of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative of local government; two representatives of the news media; and four citizens. The Council elected Senator R. Edward Houck as chair and Delegate S. Chris Jones as vice-chair in June 2002.

¹ Chapters 917 and 987 of the 2000 Acts of Assembly.

² Chapter 21 (§ 30-178 et seq.) of Title 30 of the *Code of Virginia*.

The Council provides guidance to those seeking assistance in the application of FOIA, but cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to help fashion creative solutions in an attempt to remedy disputes *and* keep parties in compliance with FOIA. The Council is a resource for the public, representatives of state and local government, and members of the media. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council has gained recognition as a forum for the discussion, study, and resolution of FOI and related public access issues based on sound public policy considerations.

EXECUTIVE SUMMARY

During this reporting period, December 2001 through November 2002, the Council was at the forefront of important access-related issues facing both the Commonwealth and the nation occasioned by the tragic events of September 11, 2001. In response, the Council formed a subcommittee to examine the adequacy of current FOIA exemptions to protect the safety of Virginia's citizens and public buildings from terrorist attacks and other threats to the public safety. The Council continued to monitor the treatment of e-mails and other electronic communications in the context of FOIA and saw the enactment by the 2002 Session of the General Assembly of Council-recommended legislation to protect personal information, including e-mail addresses, from release when such information is furnished for the purpose of receiving electronic mail from a public body (HB 731). The Council was also successful in seeing its other legislative recommendations enacted into law in 2002, specifically, HB 173/SB 208 making the Council a permanent agency of state government; HB 700, adding a record and meeting exemption relating to terrorism; and HB 729, clarifying that attorneys for the Commonwealth and other constitutional officers are public bodies as defined under FOIA.

In addition to enacting the legislative recommendations of the Council, the 2002 Session of the General Assembly referred HB 900 to the Council for further study. HB 900 would have authorized any public body subject to FOIA to petition the circuit court for a protective order relieving it, in whole or in part, of its obligations to produce requested records where the request is unreasonable, not made in good faith, or motivated primarily by an intent to abuse, harass, or intimidate the public body. The bill also would have allowed the court to require the requester to pay the reasonable attorney's fees incurred by the public body in obtaining the protective order. In its first meeting after the 2002 Session, the Council created a subcommittee to examine the issues raised by HB 900 and, as is its custom, invited and encouraged participation by any interested person.

The Council also initiated a study to reconcile the open meeting provisions of FOIA with the confidentiality requirements of the Virginia Public Procurement Act. As part of its

study, the Council examined the adequacy of current FOIA exemptions to protect from release documents generated during contract negotiations where release during the negotiation stage would adversely affect the bargaining position of a public body.

The Council grappled with the treatment of political caucuses under FOIA in response to the Commonwealth v. Matricardi case wherein FOIA was invoked as a defense to alleged illegal wiretapping activities by the defendant. The defendant claimed that the conference call of certain members of the Democratic Party concerning redistricting was an open meeting under FOIA. Although comment was actively solicited by the Council on this issue from the various caucuses of the General Assembly and other interested parties, no one appeared before the Council nor did the Council receive any comment on this issue. Based on the lack of response and acknowledging the complexity of this and related issues, the Council, by consensus, agreed to suspend their examination of political caucuses until such time it is again brought to the Council's attention.

The Council concluded this reporting period by honoring its former chairman, Delegate Clifton A "Chip" Woodrum. By resolution of the Council, Delegate Woodrum, the first chairman of the Council, was recognized for his service to the Commonwealth on FOIA-related issues and his leadership in consistently playing an important role in the development of Virginia's Freedom in Information Act.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period, in which it considered a broad range of issues, including terrorism, protective orders, political caucuses, and contract negotiations, all in the context of FOIA's open records and meetings provisions. A condensed agenda for each of these meetings appear as Appendix D. The Council's discussions and deliberations at these meetings are chronicled below.

January 7, 2002

Council Subcommittee Reports

The Council reviewed the legislative recommendations of its terrorism and Connell v. Kersey subcommittees. The terrorism subcommittee, created in response to the tragic events of September 11, 2001, was comprised of Council members Nolan T. Yelich, John Edwards, and Roger Wiley. The terrorism subcommittee unanimously agreed on draft language to expand the current record exemption relating to terrorism, with the concurrence of representatives of the Virginia Municipal League, Virginia Press Association, Virginia Association of Broadcasters, and the Virginia Coalition for Open Government. The proposed exemption, available to any public body, would protect plans that prevent or respond to terrorist activity to the extent that they contain specific tactical plans, security or emergency procedures, which, if disclosed, would jeopardize the safety of governmental personnel or general public security of any government facility, building or structure, or information storage system. The subcommittee also recommended that the current terrorism exemption from the open meeting requirement be expanded to allow any public

body to convene a closed meeting for the discussion of plans to protect public safety as it relates to terrorist activity and to receive briefings by staff members, legal counsel, law-enforcement or emergency service officials concerning actions taken to respond to such activity or a related threat to public safety. The Council unanimously adopted the recommendations of the terrorism subcommittee.

Because of the Virginia Supreme Court decision impacting FOIA in the matter of Connell v. Kersey, decided June 8, 2001, the Council created a subcommittee to address the issues raised by that case. Specifically, the Supreme Court held that attorneys for the Commonwealth are not "public bodies" as defined in FOIA. While acknowledging that attorneys for the Commonwealth are public officials, the court noted that FOIA distinguishes between "public officials" and "public bodies" in several instances, which clearly indicates that the terms are not synonymous. The Connell v. Kersey subcommittee, consisting of Council members Frank Ferguson and Roger Wiley, met with interested parties including the Virginia Association of Commonwealth Attorneys (VACA), the Virginia Municipal League, the Virginia Association of Chiefs of Police, the Virginia Press Association, the Virginia Association of Broadcasters, and the Virginia Coalition for Open Government

VACA objected to including attorneys for the Commonwealth within the definition of a public body, because of the expected administrative burden on the offices in fulfilling FOIA requests. VACA believed that the attorneys for the Commonwealth should have an exemption similar to the one currently in place for the Parole Board, which is exempt from the provisions of FOIA. After several meetings, most issues in dispute were resolved. To address VACA's concerns, language was added to the existing FOIA exemption for criminal investigation and prosecutions to specify that witness statements and case reports were also exempted from release. With the inclusion of this language, the subcommittee recommended that the definition of a public body be amended to clearly indicate that constitutional officers are subject to FOIA, but that a fairly broad exemption should be added for attorneys for the Commonwealth to allow them to withhold records relating to specific cases, investigations or prosecutions. The subcommittee also proposed that the term "public official" be eliminated from FOIA, and replaced with "officers or employees of a public body."

Continuation of Council

The Council discussed its enabling legislation, which directed that the Council be "sunsetting" on July 1, 2002. Given the volume of inquiries for advisory opinions, coupled with the frequency of requests for FOIA training, it was apparent to the Council that there was a very real need for the services it provided. This sentiment was echoed by the Virginia Municipal League, Virginia Press Association, Virginia Association of Broadcasters, and the Virginia Coalition for Open Government. As a result, the Council unanimously recommended that the two-year sunset provision be removed so that they could continue to provide training and guidance to citizens, state and local government officials, and the media on the application of FOIA. In connection with this recommendation, it was noted

that the Governor's proposed 2002-2004 biennial budget already included funding for the continuation of the Council.

June 12, 2002

Senator R. Edward Houck was unanimously elected as chair of the Council and newly appointed Delegate S. Chris Jones as vice-chair. Senator Houck and Delegate Jones will each serve two-year terms in this capacity in accordance with the Council's enabling statute.

Recap of 2002 Session; FOIA and related access bills

Council staff provided a recap of FOIA and other related access bills considered by the 2002 Session of the General Assembly. Of particular note were the enactment of all FOIA bills recommended by the Council, including HB 173, establishing the Council as a permanent legislative agency; HB 700, creating both a record and meeting exemption relating to terrorism for public bodies; HB 731, authorizing the withholding of certain citizen e-mail addresses and other information from release; and HB 729, clarifying the application of FOIA to constitutional officers. A complete listing and description of FOIA and other related access bills considered by the 2002 Session of the General Assembly was made available on the Council's website and is attached to this report as Appendix E.

Council Studies and Other Issues

The House Committee on General Laws carried over HB 900 (Purkey) and referred it to the Council for study. HB 900 would authorize any public body subject to FOIA to petition the circuit court for a protective order relieving it, in whole or in part, of its obligations to produce requested records where the request is unreasonable, not made in good faith, or motivated primarily by an intent to abuse, harass, or intimidate the public body. The bill also allows the court to require the requester to pay the reasonable attorney's fees incurred by the public body in obtaining the protective order. The Council appointed a subcommittee of Roger Wiley, John Edwards, and Wat Hopkins (all members of the Council) to begin study of this issue and to formulate recommendations.

The Council also discussed the apparent conflict between the Virginia Public Procurement Act (VPPA) and FOIA as it relates the confidentiality of procurement transactions and the open meeting provisions of FOIA. A related issue discussed was the subject of a recent Council advisory opinion relating to the protection of records and other documents compiled during contract negotiations.³ In cases not involving the VPPA, the

³ Example #1. The Town of Blacksburg was negotiating a new residential solid waste and recycling collection and disposal contract in accordance with VPPA. The Town Council had final authority to award the contract and the Council's attorney wanted to review the contract with the Council as a whole. Because the contract was not awarded, no exemptions for closed meetings were available under FOIA to review the contract with the Town Council. As a result, they relied on informal discussions on a 1-to-1 or 2-by-2 basis. This situation appears to be a Catch-22 for local governments. They cannot discuss bids or proposals in open session b/c this

Council opinion noted that currently no record exemption exists generally for a public body to withhold such records from release even though the bargaining position of the public body may be adversely affected. Because these issues had been the subjects of several inquiries to the Council, the Council appointed a subcommittee of Council members Nolan Yelich and Roger Wiley to examine the relevant statutes and make a recommendation to the Council for resolution of these issues.

The Council considered the treatment of political and other caucuses of the General Assembly under FOIA. In response to recent news articles concerning meetings held by political caucuses of the General Assembly, Council staff briefed the Council on other states' approaches to this issue and the need for clarity in Virginia's law. Political caucuses are not public bodies as defined by FOIA because they are not organizations within the Commonwealth supported wholly or principally by public funds. The issue becomes less clear, however, when party caucuses of the General Assembly discuss legislation that is before the General Assembly. In addition to party caucuses, there are also regional and other caucuses established in the General Assembly. Further, the question was raised that if a rule were established concerning caucuses of the General Assembly, should it also apply to other public bodies, including local governments? Due to the complexity of these issues, the Council directed that they continue to be an agenda item for future Council meetings. The Council expressed a desire to hear from the various caucuses and the public during the public comment portion of future Council meetings and directed staff to contact the various caucuses established in the General Assembly and invite their comment.

In a related matter, the Council unanimously agreed to formalize its policy not to render advisory opinions when a matter is in litigation. Additionally, the Council added a provision to this policy that should staff be subpoenaed solely on issues of law involving FOIA, staff is authorized to file a motion to quash any such subpoena.

National Rating

Staff advised the Council that Virginia's open records law were rated one of the five best in the nation by the Better Government Association of Illinois. The rating was based

would violate the confidentiality provisions of VPPA. Neither can they meet in a closed meeting to discuss the proposals without violating FOIA.

Example #2. FOIA Council Opinion AO-4-02 to City of Virginia Beach. "You have asked whether a public body may properly withhold records generated during contract negotiations under the Freedom of Information Act (FOIA). You advise that the records consist of drafts, documents and internal correspondence prepared by the public body for the purposes of negotiating with potential or current contractors and, if released, could adversely affect the public body's bargaining position. You state that these records reveal your negotiating strategy and supporting rationale for contract pricing, and other terms and conditions of the transaction. You indicate that the correspondence exchanged during the contract negotiations is typically between two public officials and does not include legal review. Finally, you state that while many of these contract negotiations are undertaken in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.), not all contracts negotiated by the public body are within the purview of that Act..."

on procedural criteria such as (i) the amount of time a public agency or department has to respond to a citizen's request for a public document; (ii) the process a citizen must go through to appeal the decision of an agency to deny the request for the public record; and (iii) whether an appeal is expedited when it reaches the court system. Provisions concerning penalties for violations weighed (a) whether the complaining party, upon receiving a favorable judgment in court, is awarded attorney fees and costs; and (b) whether the agency that has wrongfully withheld a record is subject to any civil or criminal punishment.

FOIA Workshops and Other Services

Staff advised the Council that the annual statewide FOIA Workshops offered by the Council were being scheduled for early September at seven locations. Staff also apprised the Council of the latest statistics on the services rendered by the Council. Since July 2000, the Council has responded to a total of 1,689 requests for opinions, both written and informal (i.e., telephone or e-mail). Of that number, the Council has issued 75 written advisory opinions. Citizens continue to make the most requests for Council assistance, followed by state and local government officials, and media, respectively.

Public Comment

The Council received a copy of draft guidelines for public bodies to use in calculating their actual costs for producing documents under FOIA. The draft guidelines were offered by a citizen who has invested time and energy in trying to understand why actual costs vary from agency to agency and from locality to locality. A suggestion that public bodies conduct a cost analysis to ensure that charges made for document production reflect the actual cost to the public body was included in the draft guidelines. The draft guidelines also offered examples of ways public bodies could keep costs to a requester low, including enlisting the help of volunteers, keeping indices of records up-to-date, and making routinely requested records more easily available.

Additionally, a representative of the Virginia Coalition for Open Government commended the General Assembly for making the Council a permanent legislative agency and encouraged the Council to keep informal mediation of FOIA disputes a priority.

August 19, 2002

The Council received progress reports from the two subcommittees it created to study (i) the apparent conflict between FOIA and the VPPA and (ii) HB 900, referred by the 2002 Session of the General Assembly to the Council.

Council Subcommittee Reports

Subcommittee member Roger Wiley reported that the subcommittee, along with several representatives of state and local government and the media, examined the apparent conflict between the VPPA and FOIA as it relates to the confidentiality of procurement transactions and the open meetings provision of FOIA. He noted that although an

exemption exists for a record relating to a procurement transaction before a bid is accepted, there is no parallel exemption for meetings for discussion of bids by a public body prior to the award of the contract. This lack of an exemption is most often problematic in small, local governments. In state agencies and larger localities, staff of public bodies often have the authority to discuss and decide whether or not to award a contract, thus the public body itself does not always need to meet to discuss the award. Participants in the meeting noted that in addition to procurement situations, there is no clear exemption allowing for a closed meeting for contract negotiations generally. The subcommittee members and other participants agreed to a proposal to amend § 2.2-3711(A)(6) of the Code of Virginia to include contract discussions and negotiations under the exemption. The exemption currently allows for a closed session to discuss "[t]he investing of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected." It was suggested to amend this language to also allow a closed meeting to negotiate or award a contract, but only for so long as there would be an adverse affect to either party in the negotiating process. The proposed exemption would only apply prior to the award of a contract or until a decision was made by a public body to not award a contract.

Mr. Wiley acknowledged that the subcommittee's recommended draft only addressed the disconnection in the VPPA and FOIA, but did not address the issue of a records exemption for a public body's contract negotiations generally. He requested that the subcommittee meet again to continue its deliberations on the appropriateness of a general record exemption under FOIA for contract negotiations.

HB 900 subcommittee member John Edwards reported that the HB 900 subcommittee, along with several representatives of state and local government and the media, reviewed the bill. He indicated that the subcommittee agreed that it had no interest in pursuing HB 900 as introduced.⁴ However, in response to some of the issues raised in discussion of the bill, it was proposed that FOIA be amended to give public bodies the discretion to require a requester to pay the charges due for a previous FOIA request before it would be required to honor a subsequent FOIA request by the same requester.

During the public comment portion of the meeting, representatives of the Virginia Press Association and the Virginia Municipal League remarked that they worked with the subcommittee and had agreed with the initial resolution discussed by the subcommittee. The Press Association raised concerns that, as drafted, the subcommittee recommendation may result in an unintended consequence. An example of this was given in the context of FOIA and separate requests made by two or more reporters of the same newspaper to the

⁴ As introduced, HB 900 would authorize any public body subject to the provisions of FOIA to petition the circuit court in the city or county in which the public body is located for a protective order relieving the public body in whole or in part from its obligation to produce or provide access to public records sought by a particular requester. The court shall grant the petition and enter such an order if the court finds that the request for access to public records is unreasonable, not made in good faith, or motivated primarily by an intent to abuse, harass, or intimidate the public body. In entering the order, the court may require the requester to pay the reasonable attorney's fees incurred by the public body in obtaining the order.

same public body. As drafted, the second reporter's FOIA request could be denied based on an outstanding invoice from the first reporter on the previous day. The representative of the Virginia Municipal League stated that although the draft did not specifically address the problems encountered by the City of Virginia Beach and PETA (the origin of HB 900), she hoped that a public body would remember who and who does not pay their FOIA charges, and that a public body would not use this tool as a sword.

Other Issues

It was brought to the attention of the Council that the Virginia Department of Agriculture and Consumer Services (VDACS) seeks to add a record exemption to authorize the withholding of records relating to animal and plant diseases as release of such records could pose a threat to the public safety in the context of terrorist activity. The Council requested staff to invite a representative of VDACS to the next Council meeting to discuss the Department's proposed exemption. Acknowledging that there will likely be more of these types of exemptions sought, the Council offered its assistance as a forum for examination of proposed FOIA and related access legislation. With its special expertise, the Council is able to serve as a clearinghouse for the General Assembly on FOIA and related access issues, including drafting assistance.

On the issue of political caucuses, Senator Houck indicated that he contacted the leadership of the party caucuses in addition to Council staff contacting all caucuses of the General Assembly to invite their comment on the operation of caucuses. It was noted, however, that there appeared to be little interest in pursuing this issue by the government, the media, or the citizens. No one appeared before the Council nor did the Council receive any comment on political caucuses. Based on the lack of response, the Council, by consensus, agreed to suspend its examination of political caucuses until such time it is again brought to the Council's attention.

A representative of the Virginia Coalition for Open Government suggested that the Council should assist citizens and government alike by providing more guidance on what constitutes "actual costs." It was pointed out that the manner in which fees are assessed varies from locality to locality. Although there are Council opinions on what may be charged, it was suggested that a guidance document by the Council would stem litigation on this issue. The Council directed staff to begin work on the alternatives for the development of educational materials relating to charges for record production.

FOIA Workshops and Other Services

Staff advised the Council that the annual statewide FOIA workshops offered by the Council were scheduled for the second and third weeks in September at seven locations: Big Stone Gap, Roanoke, Harrisonburg, Loudoun County, Prince William County, Richmond, and Virginia Beach. The program for the workshops includes segments on open records under FOIA, open meetings under FOIA, the Virginia Public Records Act, e-mail and FOIA, and the release of law-enforcement records.

Staff apprised the Council of the latest statistics on the services rendered by the Council. Since its creation, the Council has responded to a total of 2,049 requests for opinions, both written and informal (i.e., telephone or e-mail). Of that number, the Council has issued 77 written advisory opinions (with three additional opinions pending). Citizens continue to make the most requests for assistance, followed by state and local government officials, and media, respectively. Since the Council's last meeting in June 2002, (i.e., in the past 44 working days) the Council has received and responded to 360 requests for opinions, both written and informal (i.e., telephone or e-mail). Of that total, the Council has issued three written opinions (with three additional opinions pending).

November 18, 2002, Richmond

The Council began its meeting with a discussion of the FOIA suit filed in Fredericksburg against five members of the Fredericksburg City Council alleging that they held 16 illegal electronic meetings via e-mail and three illegal face-to-face meetings. The defendants include the mayor and vice-mayor of the City Council, as well as three newly-elected City Council members who did not take office until July 1, 2002. The suit asks the court to prohibit the members from holding future e-mail and private meetings and asks for penalties of \$43,500 each to be imposed on three of the defendants and \$41,000 each on the other two defendants.

The defendants filed demurrers, arguing that use of e-mail does not constitute a meeting under FOIA, and that the majority of the e-mails in question were sent before three of the defendants took office. The judge dismissed nine of the counts of the complaint involving e-mails sent before July 1, 2002, on the grounds that the members-elect were not members of the public body before this date. A trial date of December 13, 2002, was set to hear the remaining counts.

The suit in Fredericksburg will allow a court to address, for the first time, the gray area of electronic communications, and when electronic correspondence may cross the line and become a meeting for purposes of FOIA. The law is clear that an e-mail is a public record under FOIA, but does not directly address the use of e-mail in a meetings context. The law does prohibit electronic meetings, except as specifically allowed in §§ 2.2-3708 and 2.2-3709. However, it is unclear as to whether the use of e-mail constitutes an electronic meeting when messages are exchanged amongst three or more members of a public body. FOIA does contemplate the use of e-mail by public officials by affirmatively stating that e-mail may be used to separately contact the membership to ascertain a member's position with respect to the transaction of public business.⁵ This position is echoed in the opinion of the Attorney General discussed below. Until a line is established by the courts or the legislature as to whether electronic communications can cross the line between correspondence and a meeting, it has been the position of the Council that one might best heed the policy of FOIA to guarantee citizens the right to witness the operations of government and ensure that public bodies deliberate in public. If a member of a public body

⁵ 2.2-3710(B).

is questioning whether an electronic communication might lead to the deliberation of public business by three or more members of that public body, then that communication should probably be saved for a public meeting.

The Office of the Attorney General of Virginia has addressed the question of whether subsection A of § 2.2-3708⁶ would prohibit an elected member of a local governing body from sending e-mail communications to three or more other members of the governing body.⁷ The Attorney General opined that while this section did prohibit a local governing body from conducting a meeting unless the members were physically assembled, it did not prohibit all forms of communication among the members when the body was not physically assembled. The opinion referred to subsection B of § 2.2-3710, which allows the membership to separately contact one another to ascertain a member's position with respect to the transaction of public business, to illustrate that members may communicate outside of a meeting.⁸ The opinion further stated that sending an e-mail is the electronic transmission of correspondence over communication networks, and does not constitute conducting a meeting. Thus, the Attorney General concluded that the electronic meetings provision of FOIA did not prohibit a member of a governing body from sending a message, even to multiple recipients at the same time. The underlying theme of the opinion seems to rest on the fact that the use of e-mail does not result in the simultaneous communication that occurs when members are sitting together physically. The opinion did note in footnote seven, however, that "[t]his is not to say that, in a particular factual setting, communicating through electronic mail could not violate some other provision of The Virginia Freedom of Information Act or conflict with the policy of the Act."

The Council agreed to continue following the FOIA suit in Fredericksburg.

Council Subcommittee Reports

The Council continued to monitor the progress of the two subcommittees it created to study (i) the apparent conflict between FOIA and the Virginia Public Procurement Act (VPPA) and (ii) HB 900, referred by the 2002 Session of the General Assembly to the Council.

The subcommittee studying FOIA and the Virginia Public Procurement Act met again with several representatives of state and local government and the media concerning the issues tasked to the subcommittee. After the first meeting, a draft was circulated that would have amended the meeting exemption subdivision A 6 of § 2.2-3711 to include contract discussions and negotiations, for so long as an open meeting would adversely affect either party in the negotiating process. The exemption currently only exempts discussions of the investing of public funds where competition or bargaining is involved, where, if made public initially, the financial interest of the governmental unit would be adversely affected. Concerns were raised that the proposed exemption was too broad, and participants agreed

⁶ Opinion was issued prior to the recodification of Title 2.2 of the Code of Virginia. The provision referenced in the opinion is § 2.1-343.1, which is currently found at § 2.2-3708.

⁷ 1999 Op. Atty. Gen. Va. 12.

⁸ Previously § 2.1-343.2.

that instead of trying to amend an existing exemption, a new exemption should be created. After discussion, the subcommittee agreed that an exemption, A 30, should be added to § 2.2-3711 that would exempt "discussion of the award of a public contract involving the expenditure of public funds, including interviews of bidders or offerors, and discussion of the terms or scope of such contract, where discussion in an open session would adversely affect the bargaining position or negotiating strategy of the public body."

In addition to exemption discussions relating to the award of a contract, the subcommittee thought that a corresponding records exemption should also be created. The following language was proposed to create an exemption, A 82, at § 2.2-3705 for "records relating to the negotiation and award of a specific contract where competition or bargaining is involved and where the release of such records would adversely affect the bargaining position or negotiating strategy of the public body. Such records shall not be withheld after the public body has made a decision to award or not to award the contract. In the case of procurement transactions conducted pursuant to the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the provisions of this subdivision shall not apply, and any release of records relating to such transactions shall be governed by the Virginia Public Procurement Act."

The Council by consensus agreed to the subcommittee's proposed amendments described above and will recommend these FOIA amendments to the 2003 Session of the General Assembly.

The subcommittee studying FOIA and House Bill 900 met again with several representatives of state and local government and the media concerning the issues raised by House Bill 900. After the first meeting of the subcommittee, a draft was circulated that would have amended subsection F of § 2.2-3704 to give public bodies the discretion to require a requester to pay for a FOIA response before it would be required to honor a subsequent FOIA request by the same requester. At the most recent meeting, the subcommittee addressed concerns that there was no provision giving the requester time to pay an amount due for a FOIA request before a public body could begin to refuse subsequent requests. Some participants envisioned that this may create an unfair situation for a requester, since generally a person has a certain amount of time to pay a bill - such as 15 or 30 days - before penalties apply.

As a result of these concerns, it was agreed that the draft should include a 30-day period for a requester to pay any outstanding amounts due from a previous FOIA request before the public body could refuse a subsequent request. The participants at the meeting worked on several drafts of proposed language during the course of the meeting.

The following changes were proposed:

1. As a technical change to the language of FOIA, subsection F of § 2.2-3704 would be changed from "a public body may make reasonable charges for its actual costs," to read "a public body may make reasonable charges, not to exceed its actual costs." This change would make the language in subsection F parallel with the language in subsection G regarding charges for access to electronic records, which currently reads

that electronic records "shall be made available to a requester at a reasonable cost, not to exceed the actual cost in accordance with subsection F."

2. As a technical change to the language of FOIA, the paragraph that allows a public body to require a deposit if it determines in advance that charges for producing requested records will likely exceed \$200 will be moved into its own subsection, and would become subsection H of § 2.2-3704. The language of that paragraph would remain unchanged.

3. The new provision allowing a public body to require a requester to pay for a FOIA response before it will honor subsequent requests will be inserted as subsection I of § 2.2-3704. The language agreed to by the subcommittee would read, "Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that have not been paid within 30 days after billing."

The Council by consensus agreed to the subcommittee's proposed amendments described above and will recommend these FOIA amendments to the 2003 Session of the General Assembly.

Other legislative updates

The Council also heard from several officials of state and local government concerning suggestions for amendments to FOIA. Specifically, the Council heard from:

1. Judith Singleton, Director, Government Relations, Fairfax County Public Schools, concerning the need to withhold from release records of the investigation of claims filed against the insurance policy of the school system. She indicated that currently there is an exemption for records concerning reserves established in specific claims administered by the Department of the Treasury through its Division of Risk Management or by any county, city, or town. However, it is arguable that the existing law would not exempt such investigative records.

Ms. Singleton also indicated that FOIA contained no exemption for local school boards to withhold confidential investigator notes and other correspondence and information, furnished with respect to an active investigation of individual employment discrimination complaint. She noted that such an exemption was available under FOIA only for the Department of Human Resource Management.

2. Roseanna Bencoach for the State Board of Elections advised the Council that the State Board of Elections was evaluating the need to clarify FOIA's meeting provisions and meetings of state and local electoral boards. She indicated that each such board has only three members and each time two such members gather, they are having a meeting under FOIA that requires notice, openness to the public and minutes. She explained that the local boards wanted to be in compliance with all state laws.

3. Kristi Wright, Virginia Commission on Youth, advised that from their study of the release of juvenile records and the consent to the release of those records, they believed there was a conflict. Under FOIA, a juvenile may not consent to the release of his own medical records. However, under subdivision E5 of § 54.1-2969 a juvenile in certain cases may consent to the release of his medical records.

4. York County Sheriff Danny Diggs, for the Virginia Sheriff's Association discussed the release of search warrants by the courts. He indicated that the FOIA protected many aspects of a criminal investigation and prosecution, but that jeopardy to a case may result from the release of unserved search warrants and search warrant affidavits. He explained that law-enforcement officials are trained to be very specific in listing victim and other pertinent information important to an investigation, including the name of a juvenile. Sheriff Diggs advised that the legislative committee of the Virginia Sheriffs' Association unanimously endorsed legislation that would allow courts to withhold search warrants, returns and affidavits where jeopardy to the investigation of a case would result.

A representative of the Virginia Press Association advised the Council that under current law, an attorney for the Commonwealth may, for good cause shown, motion the court to seal the warrants. It was also noted that the underlying reason that search warrants are open is that they are part of the preliminary judicial process and due process requires the showing of probable cause by the government.

Other business

The Council discussed instituting a process for the receipt of legislative updates and requests from state and local agencies and others. Heartened that persons with legislative recommendations seek the Council's guidance on their proposals, the Council, nevertheless, felt that such legislative discussions should occur earlier to give the Council more time to examine and deliberate on the issues raised and to appoint whatever subcommittees they deemed appropriate.

Staff briefed the Council about the results of the 2002 Statewide FOIA Workshops held in September. Four hundred and eighteen people, including state and local government officials, citizens and media representatives, attended the various workshops. Course evaluation forms showed that participants gave the program high marks and commented that it was very informative.

In addition, staff indicated that in the 61 days since the last Council meeting, staff had responded to a total of 320 inquiries. Of those 320 inquiries, the Council issued 10 written advisory opinions and responded to 310 e-mail or telephone inquiries.

SERVICES RENDERED BY THE COUNCIL

The Council offers advice and guidance over the phone, via e-mail, and in formal written opinions to the public, representatives of state and local government, and members

of the news media. The Council also offers training seminars on the application of FOIA. In addition to the annual FOIA workshops held across the Commonwealth, the Council provides training for individual groups and agencies upon request. The Council develops and continually updates free educational materials to aid in the understanding and application of the Freedom of Information Act. During the last calendar year, the Council, with its staff of two, responded to more than 1,000 inquiries and conducted nearly 50 training seminars. A listing of these training seminars appears as Appendix B.

Statistical Summaries

At the direction of the Council, the staff has kept logs regarding FOIA inquiries. In an effort to identify the users of the Council's services, the logs characterize callers as members of state government, local government, law enforcement, media, or citizens. The logs also help keep track of the general types of questions posed to the Council and are also invaluable to the Council in rendering consistent opinions and monitoring its efficiency in responding to inquiries.

For the period of December 1, 2001, to November 30, 2002, the staff of the Council fielded 1,009 inquiries. Of these inquiries, 21 resulted in written advisory opinions, which are published on the Council's website, and the remainder were answered over the phone or via e-mail. By means of comparison, the New York Committee on Open Government, the statutory model for the Council that has been in operation more than 25 years, generally fields between 800 and 900 inquiries each year.

The Council issues written advisory opinions only upon request, and requires that all questions and facts be put in writing by the requester. Requests for written opinions are handled on a "first come, first served" basis. Response time is generally two to four weeks, depending on the number of pending requests for written opinions, the complexity of the issues, and the other workload of the staff. A list of the opinions issued during the past year appears as Appendix C. The following tables profile who requested written advisory opinions from December 1, 2001 to November 30, 2002:

Written Advisory Opinions: 19

State Government	0
Local Government	6
Law Enforcement	0
Members of the Public	11
Members of the News Media	2

Typically, the Council provides advice over the phone or via e-mail. The bulk of the inquiries that the Council receives are handled in this manner. The questions and responses are recorded in a database for the Council's own use, but are not published on the website like written advisory opinions. Questions are often answered on the day of receipt, although response time may be longer depending on the complexity of the question and the research required.

Phone and E-mail Responses: 990

State Government	161
Local Government	266
Law Enforcement	38
Members of the Public	339
Members of the News Media	165
Out of State/Other	21

During the past year, the Council has answered a broad spectrum of questions about FOIA. The following table provides a general breakdown of the type and number of issues raised in inquiries to the Council.

Types of Inquiries received

Records:

Mechanics of a request for records (i.e., how to make a request, appropriate response to a request, custodian of record, etc.)	94
Personnel records (including access to salary and job position of public employees)	88
Law-enforcement records	51
Charges for records	45
Tax records	20
Working papers	16
Medical records	11
Scholastic records	10
Court records	10
Written advice of legal counsel; attorney/client privilege	7
Licensing records	6
E-mail	6
Prison records	6
Draft records	3
Consultants reports	3
Other questions relating to records ⁹	60

⁹ Questions about whether a particular document was subject to disclosure or withholding; questions about a specific exemption not listed, etc.

Meetings:

Mechanics of open meetings (notice, agenda, minutes, etc.)	43
Definition of a meeting	39
Personnel discussion	26
Motion and certification of closed meetings	14
Voting	11
Electronic meetings	11
Public Comment	7
Consultation with legal counsel	5
Chance meetings	4
Annexation	4
Special and emergency meetings	4
Public forum	4
Polling	3
Property discussion	2
Other meeting questions ¹⁰	23

General:

Outside scope of FOIA ¹¹	56
General FOIA questions	45
Definition of a public body	42
Records and meetings relating to procurement transactions	18
Remedies	16
Privacy issues	9
Public Records Act	9
Other	25

FOIA Services:

Request for FOIA Training	53
Request for FOIA Materials	37
Questions about role of FOIA Council	22
FOIA Legislation	13
Request for document review	8
Suggestions/FYI	13

¹⁰ Generally, questions about applicability of a specific exemption or type of record not categorically listed above.

¹¹ Typically, these types of questions deal with access to records of private corporation, access to federal agencies, etc.

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. In the past year, the website has received more than 20,000 hits, averaging 55 hits per day. This includes more than 2,500 downloads of a copy of the Freedom of Information law, one of the resources available on the website. The Council's website also provides access to (i) Council's meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms, (iv) the Council's annual reports, (v) information about Council studies, and (vi) links to other Virginia resources, including the Virginia Public Records Act, FOIA overview with frequently asked questions, and FOIA summary and compliance tips from the Office of the Attorney General. Written advisory opinions have been available on the Council's website since January 2001 and are searchable by any visitor to the website. The opinions are also listed in chronological order with a brief summary to assist website visitors.

FOIA Workshops

For the third year, Council conducted statewide FOIA training workshops. This year, the workshops were held in September over a two-week period at the following locations: Richmond, Loudoun County, Prince William County, Roanoke, Big Stone Gap, Bridgewater, and Virginia Beach. In addition to the FOIA Council, the statewide workshops were sponsored by the Virginia Administrative Law Advisory Committee, the Virginia Association of Broadcasters, the Virginia Association of Chiefs of Police, the Virginia Association of Counties, the Virginia Coalition for Open Government, the Virginia Local Government Attorneys Association, the Virginia Municipal League, the Virginia Press Association, the Virginia Sheriff's Association, and the Virginia School Boards' Association. Four hundred and eighteen persons attended the various workshops, representing state and local government, law enforcement, members of the media, and citizens. Course evaluation forms turned in by the participants indicated that the workshops were well received. The program for the workshops included segments on open records under FOIA; open meetings under FOIA; the Virginia Public Records Act, e-mail and FOIA; and the release of law-enforcement records. The workshops were approved by the Virginia State Bar for six hours of mandatory continuing legal education credit for attorneys and by the Department of Criminal Justice Services for in-service credit required for members of law enforcement.

Educational Materials

The Council, in cooperation with the Virginia Coalition on Open Government, produced a public service poster titled *Open Government—It's your call. 1-866-448-4100*.

The poster has been distributed to state and local officials to publicize the existence and role of the Council to encourage and facilitate compliance with FOIA.

The Council, in cooperation with the Library of Virginia, published a brochure titled *Privacy vs. Public Access*, which has been widely requested. In response to the demand and legislative changes, a second edition of this brochure has been published.

In preparation for a presentation at the annual conference of the Council on Government Ethics Law, the Council prepared a written summary of access legislation and litigation in the fifty states during the past year. In addition to providing citations to individual cases, statutes, and bills, the summary also provided an analysis identifying trends that emerged across the county, such as legislation addressing terrorism and security, and litigation dealing with privacy issues.

In response to frequent questions concerning motions to convene in closed session, the Council developed a one-page handout outlining the basic requirements of a specific statutory citation, a statement of purpose, and a statement of subject. The handout explains what a statement of purpose and subject must contain, and gives three examples as to how to properly construct the statutorily required motion.

In addition to producing these new materials, the Council continues to revise and make available existing education materials. As indicated above, educational materials are available on the Council's website. Other resources, other than those already mentioned, include handouts outlining access to records, access to meetings, electronic communications, and law enforcement records.

CONCLUSION

In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues related to FOIA and access generally. The Council has gained recognition as a forum for the discussion, study, and resolution of FOIA and related public access issues based on sound public policy considerations. During its second year of operation, the Council continued to serve as a resource for the public, representatives of state and local government, and members of the media, responding to over 1,000 inquiries. It formed workgroups to examine FOIA and related access issues, and encouraged the participation of many individuals and groups in Council studies. Through its website, the Council provides increased public awareness of and participation in its work, and publishes a variety of educational materials on the application of FOIA. Its commitment to facilitating compliance with FOIA through training continued in the form of annual statewide FOIA workshops and other specialized training sessions. The Council would like to express its gratitude to all who participated in the work of Council for their hard work and dedication.

Respectfully submitted,

R. Edward Houck, *Chairman*
S. Chris Jones, *Vice-Chairman*
David E. Anderson
Ralph L. "Bill" Axselle, Jr.
Rosanna L. Bencoach
John Stewart Bryan, III
John B. Edwards
W. Wat Hopkins
E. M. Miller, Jr.
Thomas M. Moncure, Jr.
Roger C. Wiley
Nolan T. Yelich

Appendix A

A BILL to repeal the second enactment of Chapters 917 and 987 of the 2000 Acts of Assembly, relating to the Freedom of Information Advisory Council.

Be it enacted by the General Assembly of Virginia:

1. That the second enactment of Chapters 917 and 987 of the 2000 Acts of Assembly of the Code of Virginia is repealed.

#

Training/Education Presentations

An important aspect of the Council's work involves efforts to educate by means of seminars, workshops, and various public presentations.

From December 1, 2001, through the end of November 2002, the staff gave approximately 50 presentations, which are identified below by interest group in chronological order.

December 6, 2001	Virginia Government Communicators Richmond, Virginia
December 8, 2001	Virginia General Assembly New Member Orientation Richmond, Virginia
December 11, 2001	Compensation Board New Officers Training Richmond, Virginia
February 15, 2002	Delegation from Mexico Development of FOIA laws in Mexico Richmond, Virginia
March 20, 2002	Virginia Rural Water Association Richmond, Virginia
March 27, 2002	Henrico County Technology Advisory Committee Richmond, Virginia
April 2, 2002	Page County Officials Luray, Virginia
April 4, 2002	Department of Treasury Annual Risk Management Conference Richmond, Virginia
April 11, 2001	Society of Professional Journalists Richmond, Virginia
April 18, 2002	Virginia Municipal Clerks Association 27th Annual Conference Lynchburg, Virginia

April 30, 2002	Monticello Area Community Action Agency Charlottesville, Virginia
May 23, 2002	State Board of Elections Conference Roanoke, Virginia
June 5, 2002	Virginia Commonwealth Communicators Williamsburg, Virginia
June 10, 2002	VDOT Management Institute Richmond, Virginia
June 12, 2002	Department of Treasury Richmond, Virginia
June 17, 2002	Community Group via conference call
June 25, 2002	Constitutional Officers Training Richmond, Virginia
June 28, 2002	Constitutional Officers Training Blacksburg, Virginia
July 26, 2002	Taskforce on Identity Theft Office of the Attorney General of Virginia Danville, Virginia
August 13, 2002	Virginia Government and Law Constitutional Officers Charlottesville, Virginia
August 13, 2002	Brookneal Town Council Brookneal, Virginia
August 22, 2002	Town of Leesburg and surrounding counties Leesburg, Virginia
August 23, 2002	Roanoke Times Roanoke, Virginia
September 4, 2002	Virginia Local Government Web Alliance Charlottesville, Virginia
September 5, 2002	Rural Retreat Town Council and Staff

	Rural Retreat, Virginia
September 9-20, 2002	FOIA Workshops Statewide
September 10, 2002	Roanoke Times Roanoke, Virginia
September 24, 2002	Senior Connections, The Capital Area Agency on Aging Richmond, Virginia
September 28, 2002- October 2, 2002	Conference on Governmental Ethics Laws Annual Conference Ottawa, Canada
October 4, 2002	Fire Services Board Leesburg, Virginia
October 9, 2002	Commonwealth Management Institute Richmond, Virginia
October 18, 2002	Virginia Sheriffs' Association Management Conference Virginia Beach, Virginia
October 23, 2002	Fairfax County Government Communicators Fairfax, Virginia
October 24, 2002	Joint Commission on Technology & Science Integrated Government Advisory Committee Richmond, Virginia
October 25, 2002	Senate, Virginia General Assembly New Member Training Richmond, Virginia
October 30, 2002	James City County Officials James City County, Virginia
October 31, 2002	VIPNet Board Orientation Richmond, Virginia
November 5, 2002	Hampton University Hampton, Virginia

November 15, 2002	Virginia Coalition for Open Government Access 2002 Conference Richmond, Virginia
November 15, 2002	Virginia Congress of Parents and Teachers 97th Annual Convention Richmond, Virginia
November 20, 2002	Lorman Legal Education Seminar "What You Need to Know About Public Records and Open Meetings in Virginia" Roanoke, Virginia
November 21, 2002	Virginia Education Association Annual Conference Wintergreen, Virginia
November 26, 2002	Metropolitan Washington Airport Authority Police Records Section National Airport
November 26, 2002	House of Delegates, Virginia General Assembly New Member Training Richmond, Virginia

ADVISORY OPINIONS ISSUED
December 1, 2001, through November 30, 2002

Opinion No.

Issue(s)

December 2001

- AO-49-01 A public body may create a new record in its discretion; however, it cannot charge a requestor without prior consent. A public body may not charge a requestor for sending courtesy copies of a FOIA request to a third party as it is a general cost associated with the transacting of general business of the public body. Staff time spent responding to a FOIA request is an actual cost that may be passed on to a requestor; however, whether or not the actual cost is also reasonable is a question for the courts.
- AO-50-01 A county administrator, as the chief executive officer may properly withhold correspondence between her and the board of supervisors.

2002 (through November)

- AO-01-02 A public body must release the names of current public employees and salary information under FOIA. FOIA does not require, however, the release of records related to the retirement of specific public employees which may properly be withheld as personnel records.
- AO-02-02 Three members of a public body may gather at a private meeting without the private meeting becoming a meeting under FOIA if the members of the public body do not "discuss" or "transact" public business.

- AO-03-02 Records of expenditures for Building Code Academy are not exempt from disclosure nor is the disclosure of such records otherwise prohibited by law. The format or degree of detail included in the record is within the discretion of the public body that is the custodian of the record.
- AO-04-02 A public body must release records generated during contract negotiations in the absence of a statutory exemption from the mandatory disclosure requirements of FOIA for such records.
- AO-05-02 The inclusion of fringe benefits as part of the charges that may be assessed is an extraneous fee to recoup the general costs of transacting the general business of the public body and therefore may not be computed in the charges allowable under FOIA for the production of requested records.
- AO-06-02 Definition of a meeting; notice requirements for public meetings; waiver of notice by public officials.
- AO-07-02 Application of personnel records exemption to employee timesheets.
- AO-08-02 Individual polling of city council members by city manager is allowable under FOIA; motion to enter into closed session must meet all three statutory requirements; discussion in closed session may not stray from exemptions cited in motion; votes must be taken in open meeting.
- AO-09-02 Corporation is subject to FOIA when it is wholly owned by a public body, and its records are subject to public disclosure.
- AO-10-02 Delinquent tax information is public record; public body may make reasonable charges for the actual costs incurred in providing copies of records; public body has five working days to respond to a FOIA request.
- AO-11-02 Court records are subject to disclosure pursuant to FOIA; a requester has the right to request records in any medium used by a public body in the course of its regular business.

- AO-12-02 The mayor or the chief executive officer of a locality, but not both, may exercise the working papers exemption.
- AO-13-02 The procedures and practices governing the process by which those people designated by an inmate are notified in case of serious illness, injury or death are subject to disclosure under FOIA.
- AO-14-02 Public body may make reasonable charges for its actual costs incurred in responding to request for records; question of reasonableness is for the courts.
- AO-15-02 Use of a "straw poll" in closed meeting is permitted by FOIA; however, no agreement reached in a closed meeting becomes effective until the membership of the public body votes in an open meeting.
- AO-16-02 Local public bodies may not conduct telecommunication meetings under FOIA.
- AO-17-02 The Halifax County Industrial Development Authority is a public body under FOIA and is subject to the open meeting requirements of FOIA; role of FOIA Council.

2002 Meetings of the Freedom of Information Advisory Council

Monday, January 7, 2002, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Review of legislative recommendations of terrorism and *Connell v. Kersey* subcommittees, and recommendation that sunset provision be removed from Council's enabling legislation.

Wednesday, June 12, 2002, 10:00 a.m.

House Room D, General Assembly Building, Richmond

Election of new chair and vice-chair.

Review of FOIA and related access legislation passed by 2002 General Assembly. Review of bill referred by General Assembly to the Council for study and creation of subcommittee to study bill: HB 900, Purkey. FOIA; protective orders in response to harassing requests. Discussion of apparent conflict between FOIA and the Virginia Public Procurement Act; creation of subcommittee. Discussion of political caucuses; national rating of Virginia FOIA; plans for statewide workshops. Update of number of inquiries to Council for opinions (written and oral). Public comment concerning issue of "actual costs" for producing documents.

Monday, August 19, 2002, 2:00 p.m.

House Room D, General Assembly Building, Richmond

Progress reports from subcommittees studying HB 900 and Procurement.

Discussion of possible request for records exemption by Virginia Department of Agriculture and Consumer Services; discussion of political caucus and decision to table the issue until brought to Council's attention in future. Public comment on "actual costs" issue.

Update on planning of statewide FOIA workshops; update on number of inquiries to Council for opinions (written and oral).

Monday, November 18, 2002, 2:00 a.m.

House Room D, General Assembly Building, Richmond

Discussion of FOIA suit in Fredericksburg involving use of e-mail by city council members. Reports from subcommittees studying HB 900 and Procurement. Discussion of possible legislative recommendations; presentations by: Judith Singleton, Director of Government Relations, Fairfax County Public Schools, concerning need to withhold records of investigation of claims filed against school's insurance policy; Roseanna Benchoach for State Board of Elections, concerning clarification of FOIA's meeting provisions and meetings of state and local electoral boards; Kristi Wright with Virginia Commission on Youth concerning possible inconsistency between FOIA and other statute concerning a juvenile's ability to consent to the release of his medical records; Danny Diggs, Sheriff of York County for the Virginia Sheriffs' Association concerning release of search warrants by the courts.

Discussion of developing a process for receipt of legislative updates and proposals. Recap of statewide FOIA workshops. Update of number of inquiries to Council for opinions (oral and written).

*Status Of Freedom Of Information and Other Related Access Bills Considered
By The 2002 General Assembly*

Foia Bills Submitted By the Council

BILL NUMBER: House Bill 173 Enacted (c. 26)
PATRON: Woodrum
SUMMARY: *Freedom of Information Advisory Council.* Removes the sunset of July 1, 2002, thereby making the FOIA Council a permanent legislative agency. See also SB 208 (c. 75).

BILL NUMBER: House Bill 700 Enacted (c. 715)
PATRON: Jones, S.C.
SUMMARY: *Freedom of Information; exemptions relating to terrorism.* Provides a record exemption from FOIA, including (i) plans to prevent or respond to terrorist activity, to the extent such records set forth specific tactics, or specific security or emergency procedures; and (ii) engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure. The bill also expands the open meeting exemption to provide that a public body may convene a closed meeting for the discussion of plans to protect public safety as it relates to terrorist activity. The bill also authorizes the custodian of public records to require a requester of records to provide his name and legal address. Incorporates HB 728.

BILL NUMBER: House Bill 731 Enacted (c. 242)
PATRON: Woodrum
SUMMARY: *Freedom of Information Act; record exemption for certain e-mail addresses.* Provides an exemption from the mandatory disclosure requirements of FOIA for personal information, including electronic mail addresses furnished 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. The bill provides that access shall not be denied to the person who is the subject of such record. See also SB 308/c. 155.

BILL NUMBER: House Bill 729 Enacted (c. 393)
PATRON: Woodrum
SUMMARY: *Freedom of Information Act; definition of "public body"; application to constitutional officers.* Provides that for the purposes of those provisions of FOIA applicable to access to public records, constitutional officers shall be considered public bodies and, except as otherwise expressly provided by law, shall have the same obligations to disclose public records as other custodians of public records. The bill also eliminates the term "public official" from FOIA. The bill also expand a current record exemption for criminal records to include case files or reports and witness statements. The bill contains technical amendments.

Other FOIA Bills

BILL NUMBER: House Bill 9 Enacted (c. 572)
PATRON: Hamilton
SUMMARY: *Persons with mental retardation, developmental disabilities, or mental illness.* Revises the external human rights system for persons with mental retardation, developmental disabilities, or mental illness. The Department for Rights of Virginians with Disabilities is removed from the executive branch and becomes an independent state agency renamed the Virginia Office for Protection and Advocacy. The bill creates a governing board for the Office, consisting of 11 members who are appointed by the Governor and the General Assembly for staggered terms. No such appointments shall be members of the General Assembly. This board shall hire the agency director, who shall be an attorney in good standing licensed to practice in Virginia. The Office is given the authority to access facilities and programs, receive notification of deaths in state facilities and to protect the confidentiality of records. The bill establishes an ombudsman program, within the new office, to become effective July 1, 2004, and creates the Protection and Advocacy Fund.

BILL NUMBER: House Bill 19 Enacted (c. 87)
PATRON: Tata
SUMMARY: *Eastern Virginia Medical School; emergency.* Revises the legal name of the Medical College of Hampton Roads to be consistent with its commonly accepted popular name, i.e., "Eastern Virginia Medical School" and strengthens and modernizes the school's authorities and status. This bill clarifies issues relating to the makeup and authority of the board. The bill also provides exceptions, parallel to those exceptions provided for publicly supported institutions of higher education or the publicly supported medical schools, from the prohibited contracts provisions of the conflicts of interest law, and the records disclosure and closed meeting provisions of the Freedom of Information Act. The bill reinforces the fact that the Administrative

Process Act and the Public Procurement Act do not apply to Eastern Virginia Medical School, which, although established in law, is not a state-owned institution of higher education. See also SB 35.

BILL NUMBER: House Bill 235 **Enacted (c. 522)**
PATRON: Gear
SUMMARY: *Freedom of Information Act; treatment of consultant's reports.* Provides for public access to nonexempt portions of reports of a consultant hired by or at the request of a local public body or the mayor, chief executive officer or administrative officer of the local public body where the contents have been distributed or disclosed to members or the public body has scheduled any action on a matter that is the subject to the report.

BILL NUMBER: House Bill 312 **Stricken by patron**
PATRON: Howell
SUMMARY: *Confidentiality of pretrial records.* Exempts any pretrial investigation report prepared by a local pretrial services officer or agency from the Virginia Freedom of Information Act.

BILL NUMBER: House Bill 331 **Failed in committee**
PATRON: Darner
SUMMARY: *Secretary of the Commonwealth; appointments.* Requires the Secretary of the Commonwealth to provide, upon the request of any member of the General Assembly, the number of persons appointed to any state board, commission, agency or authority, categorized by race, gender and national origin. Under current law, the Secretary is required to report such information to the General Assembly by December 1 of each year.

BILL NUMBER: House Bill 395 **Enacted (c. 798)**
PATRON: Lingamfelter
SUMMARY: *Freedom of Information Act; record exemption for zoning complaints.* Adds an exemption from the mandatory release provisions of FOIA for the names, addresses and telephone numbers of complainants furnished in confidence with respect to an investigation of individual zoning enforcement complaint made to a local governing body.

BILL NUMBER: House Bill 450 **Enacted (c. 633)**
PATRON: Dillard
SUMMARY: *Dispute resolution.* Creates the Virginia Administrative Dispute Resolution Act, which authorizes public bodies to use dispute resolution proceedings. State agencies are required to adopt policies to address the use of dispute resolution proceedings within the agency and for the agency's programs and operations. Each state agency must designate a dispute resolution coordinator. The bill establishes the Interagency Dispute Resolution Advisory Council as an advisory

council to the Secretary of Administration. Confidentiality provisions are established.

BILL NUMBER: House Bill 529 Stricken by patron
PATRON: Devolites
SUMMARY: *Freedom of Information Act; record exemptions.* Adds a records exemption for those portions of records containing identifying information of a personal, medical or financial nature provided to a public body where the release of such information would jeopardize the safety of any person. This exemption is similar to the exemption currently available to law-enforcement agencies.

BILL NUMBER: House Bill 545 Continued to 2003
PATRON: Kilgore
SUMMARY: *Prescription Monitoring Program established.* Requires the Director of the Department of Health Professions to establish the Prescription Monitoring Program, which will require reports to the Department from dispensers of certain drugs (to be called "covered substances") that will include detailed information on the recipient of the prescription and the drug prescribed. The information in possession of the Program is exempted from the Freedom of Information Act; however, the Director is authorized to disclose information under limited circumstances to prescribers, dispensers, the Department of State Police and others. The Director is also authorized to notify the Attorney General or the appropriate attorney for the Commonwealth of possible violations of law and to disclose information to dispensers and prescribers that indicates a potential detriment to a recipient. Immunity from liability is provided to the Director and the Department's employees for the accuracy or lack thereof of the data reported. Penalties for violations of this act will be Class 1 misdemeanors. Licensees may be subject to disciplinary action by the relevant board for failure to report or for unauthorized use or disclosure of the confidential information. The Director is required to promulgate emergency regulations and the reporting requirements will not be implemented until the date specified in the regulations. All dispensers and prescribers must be notified of the implementation date.

BILL NUMBER: House Bill 587 Enacted (c. 580)
PATRON: Lingamfelter
SUMMARY: *Freedom of Information Act; posting of minutes by certain state public bodies.* Requires all boards, commissions, councils, and other public bodies created in the executive branch of state government and subject to the provisions of the Freedom of Information Act to post minutes of their meetings on the Internet. Under the bill, draft minutes must be posted within ten working days of each meeting and final minutes

within three working days of final approval of the minutes. See also SB 416 (c. 618).

BILL NUMBER: House Bill 724 **Enacted (c. 769)**
PATRON: Howell
SUMMARY: *Confidentiality of pretrial and community-based probation records.* Exempts any pretrial investigation report or other records of a local pretrial services agency and any report or other records of a local community-based probation agency from the Virginia Freedom of Information Act.

BILL NUMBER: House Bill 900 **Continued to 2003**
PATRON: Purkey
SUMMARY: *Freedom of Information Act; remedy for requests intended to harass.* Authorizes any public body subject to the provisions of FOIA to petition the circuit court in the city or county in which the public body is located for a protective order relieving the public body in whole or in part from its obligation to produce or provide access to public records sought by a particular requester. The court shall grant the petition and enter such an order if the court finds that the request for access to public records is unreasonable, not made in good faith, or motivated primarily by an intent to abuse, harass, or intimidate the public body. In entering the order, the court may require the requester to pay the reasonable attorney's fees incurred by the public body in obtaining the order.

BILL NUMBER: House Bill 914 **Failed in committee**
PATRON: O'Bannon
SUMMARY: *Freedom of Information; record exemption for the Tobacco Settlement Foundation.* Provides an exemption from the mandatory disclosure requirements of FOIA for data, records or information of a proprietary nature produced or collected by or for the Tobacco Settlement Foundation as part of study or research of marketing or operational strategies to restrict the use of tobacco products by minors, when such data, records or information have not been publicly released, published, copyrighted or patented.

BILL NUMBER: House Bill 973 **Failed in committee**
PATRON: Pollard
SUMMARY: *House of Delegates; office allowance and FOIA.* Subjects any record pertaining to the use of funds from the office allowance provided to members of the House of Delegates to public inspection and copying under the Freedom of Information Act (FOIA). Currently, these private records are not covered by FOIA because they are records not held by a public body.

BILL NUMBER: House Bill 1203 Enacted (c. 297)
PATRON: Parrish
SUMMARY: *Freedom of Information; meetings of board of visitors of the University of Virginia.* Extends from July 1, 2002, to July 1, 2004, the authority of the board of visitors of the University of Virginia to conduct meetings via audio/video communication when at least two-thirds of the membership is physically assembled at its regular meeting place and when the customary requirements of public notice, voting and recordation of the meetings are followed.

BILL NUMBER: House Bill 1250 Enacted (c. 655)
PATRON: Watts
SUMMARY: *Freedom of Information Act; exemptions related to the Public-Private Transportation Act of 1995.* Expands the existing records exemption for confidential proprietary records submitted in confidence to an affected local jurisdiction, as that term is defined in the Public-Private Transportation Act of 1995. Currently, this exemption applies only to records submitted to a responsible public entity under the Public-Private Transportation Act of 1995. The bill also provides a corollary exemption from the open meeting provisions for discussions relating to such confidential proprietary records by a responsible public entity or an affected local jurisdiction.

BILL NUMBER: House Bill 1275 Stricken by patron
PATRON: Rust
SUMMARY: *Department of Criminal Justice Services; certain information to be held confidential.* Provides that neither the Department nor its employees shall release personal information, as defined in § 2.2-3801, submitted to the Department by private security services business regulants for the purpose of obtaining or renewing a license, certification or registration. The bill provides that nothing shall be construed to prohibit the release or publication of aggregate statistical information in a form that does not reveal the identity of such persons, except that access shall not be denied to the person who is the subject thereof. The bill also cross references this exemption from mandatory disclosure in the Freedom of Information Act.

BILL NUMBER: Senate Bill 12 Enacted (c. 491)
PATRON: Mims
SUMMARY: *Recodification of Titles 2.1 and 9; corrections bill.* Makes housekeeping amendments to several sections that were recodified in former Titles 2.1 and 9. These housekeeping amendments correct scrivener and computer errors discovered after passage of the recodification bill in 2001. The bill is a recommendation of the Virginia Code Commission.

BILL NUMBER: Senate Bill 38 Enacted (c. 429)
PATRON: Newman
SUMMARY: *Virginia Freedom of Information Act (FOIA); electronic communication meetings.* Extends the exemption of certain public bodies from the FOIA's electronic communication meeting restrictions from July 1, 2002, to July 1, 2004. The exempted entities are (i) any public body (a) in the legislative branch of state government or (b) responsible to or under the supervision, direction, or control of the Secretary of Commerce and Trade or the Secretary of Technology or (ii) the State Board for Community Colleges. The bill also extends from April 15, 2001, to April 15, 2003, the filing date for submitting a report detailing their experience with meetings held under this pilot program.

BILL NUMBER: Senate Bill 134 Enacted (c. 830)
PATRON: Stolle
SUMMARY: *Freedom of Information; exemptions relating to terrorism.* Provides a record exemption from FOIA for (i) plans to prevent or respond to terrorist activity, to the extent such records set forth specific tactics, or specific security or emergency procedures,; and (ii) engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building, structure, or information storage systems. The bill also expands the open meeting exemption to provide that a public body may convene a closed meeting for the discussion of plans to protect public safety as it relates to terrorist activity and briefings by staff members or legal counsel concerning actions taken to respond to such activity or a related threat to public safety. The bill also authorizes the custodian of public records to require a requester of records for his name and legal address.

BILL NUMBER: Senate Bill 206 Enacted (c. 499)
PATRON: Houck
SUMMARY: *Virginia Freedom of Information Act.* Amends provisions relating to the exemption of records and discussions of the Virginia Retirement System (VRS) and local government investment transactions from disclosure under the Freedom of Information Act (FOIA) and adds records and discussion of the Rector and Visitors of the University of Virginia when managing endowment funds of the University. Under the bill, the record and open meeting exemptions may operate when there are confidential analyses prepared by the VRS, local retirement system, or the UVA Rector and Visitors or provided to those entities

under a promise of confidentiality and the disclosure of such analyses would have an adverse effect on the value of the investment.

BILL NUMBER: Senate Bill 398 **Enacted (c. 455)**
PATRON: Martin
SUMMARY: *Disciplinary proceedings of health regulatory boards.* Revises the authority of health regulatory boards relating to disciplinary proceedings to (i) amend the present exemption to authorize closed meetings of health regulatory boards or conference committees to consider settlement proposals in pending disciplinary actions or modifications to previously issued board orders as requested by either of the parties; (ii) authorize health regulatory boards to meet by telephone conference call to consider settlement proposals in matters pending before special conference committees or matters referred for formal proceedings or to consider modifications of previously issued board orders when such considerations have been requested by either of the parties; (iii) correct references to court or agency orders to more accurately refer to "documentation" of the order; and (iv) authorize, if reasonable notice of the information is given to the person, the health regulatory boards to consider other information concerning possible violations of Virginia law in hearings relating to suspensions because of felony convictions or adjudications of incapacity.

BILL NUMBER: Senate Bill 425 **Enacted (c. 481)**
PATRON: Wampler
SUMMARY: *Prescription Monitoring Program established.* Requires the Director of the Department of Health Professions to establish the Prescription Monitoring Program, which will require reports to the Department from dispensers of certain drugs (to be called "covered substances") that will include detailed information on the recipient of the prescription and the drug prescribed as the result of a specific investigation of a recipient dispenser or prescriber by the State Police, a grand jury, or by the board regarding any allegation of misconduct by a dispenser. The information in possession of the Program is exempted from the Freedom of Information Act; however, the Director is authorized to disclose information under limited circumstances to prescribers, dispensers, the Department of State Police and others. The Director is also authorized to notify the Attorney General or the appropriate attorney for the Commonwealth of possible violations of law and to disclose information to dispensers and prescribers that indicates a potential detriment to a recipient. In addition, the Director is authorized to contract for the implementation and maintenance of the Prescription Monitoring Program. Immunity from liability is provided to the Director and the Department's employees for the accuracy or lack thereof of the data reported. Penalties for violations of this act will be Class 1 misdemeanors. Licensees may be subject to disciplinary action by the relevant board

for failure to report or for unauthorized use or disclosure of the confidential information. The Director is required to promulgate emergency regulations, the reporting requirements will not be implemented until the date specified in the regulations, and all dispensers and prescribers must be notified of the implementation date.

BILL NUMBER: Senate Bill 681 Enacted (c. 571)
PATRON: Stosch
SUMMARY: *The Public-Private Education Facilities and Infrastructure Act of 2002.* Authorizes private entities to acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects after obtaining approval of a public entity that has the power to take such actions with respect to such projects. A "qualifying project" is (i) any facility that is operated as part of the public school system or as an institution of higher education; (ii) any building for principal use by any public entity; (iii) any equipment or improvements necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; or (v) a recreational facility. A responsible public entity may approve such a facility if it determines that (i) there is a public need for or benefit derived from the qualifying project of the type proposed by the private entity; (ii) the estimated cost of the qualifying project is reasonable in relation to similar facilities; (iii) the private entity's plans will result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project. Prior to commencing the qualifying project, the private entity shall enter into a comprehensive agreement with the responsible public entity. The bill exempts such projects from the Virginia Public Procurement Act. The provisions for the approval and operation of such projects are similar to those in the Public-Private Transportation Act of 1995.

Other Access Bills

BILL NUMBER: House Joint Resolution 87 **Passed**
PATRON: Devolites
SUMMARY: *Court files.* Establishes a joint subcommittee to study protection of information contained in the records, documents and cases filed in the courts of the Commonwealth. The joint subcommittee shall submit its written findings and recommendations to the Governor and the 2003 Session of the General Assembly.

BILL NUMBER: House Bill 13 **Enacted (c. 306)**
PATRON: Howell
SUMMARY: *Publication of Virginia State Bar advisory opinions.* Adds the opinions of the State Bar's standing committee on Lawyer Advertising and Solicitation to the list of advisory opinions to be published with the Code of Virginia. This bill is a recommendation of the Virginia Code Commission.

BILL NUMBER: House Bill 28 **Continued to 2003**
PATRON: Callahan
SUMMARY: *Department of Human Resource Management; public institutions of higher education; State Council of Higher Education; expectation of privacy in communications.* Prohibits the Department of Human Resource Management from enforcing any policy that has the effect of denying an expectation of privacy in electronic communications to students, faculty and professional staff of those public institutions of higher education in the Commonwealth that have previously adopted acceptable use of computing policies approved by the State Council of Higher Education of Virginia (SCHEV). SCHEV has the duty, responsibility and authority to review these acceptable use of computing policies submitted to it pursuant to this act and notify the institution whether such policy is approved.

BILL NUMBER: House Bill 92 **Failed in committee**
PATRON: Welch
SUMMARY: *Electronic filing of campaign finance disclosure reports.* Requires, rather than permits, candidates for the General Assembly to file the reports required by the Campaign Finance Disclosure Act by computer or electronic means in accordance with the standards approved by the State Board of Elections. Currently, candidates for Governor, Lieutenant Governor, and Attorney General are required to file electronically, and candidates for the General Assembly have the option to file paper reports.

BILL NUMBER: House Bill 112 Continued to 2003
PATRON: Marshall, R.G.
SUMMARY: *State and Local Government Conflict of Interests Act; disclosure of personal interests.* Provides that when disclosure accompanies disqualification, the disclosure must be provided with specificity. The bill also (i) adds options to own interests that otherwise would constitute a "personal interest" to the definition of "personal interest" under the Act and (ii) adds members of entities created to advise on land use issues to those required to make public disclosure upon the taking of such office if the local governing body so provides.

BILL NUMBER: House Bill 146 Enacted (c. 100)
PATRON: Purkey
SUMMARY: *Reporting dangerous microbes and pathogens.* Requires laboratories in the Commonwealth to report their inventories and changes of inventories of dangerous microbes and pathogens to the State Department of Health. The laboratories must also immediately report inventory that cannot be accounted for within 24 hours. The Board of Health is to determine the list of dangerous microbes and pathogens to be reported and the manner of such reporting.

BILL NUMBER: House Bill 252 Continued to 2003
PATRON: McQuigg
SUMMARY: *Government Performance and Results Act.* Requires each state agency to develop a strategic plan and specifies what should be included in such plan. The bill also provides for each agency to submit its strategic plan to the Joint Rules Committee on a schedule developed by the Committee and the Governor. After review, the Committee may submit comment to the Governor on issues of concern relative to the strategic plan including recommendations for improving the plan. The bill also provides for (i) the Governor to submit with the Budget Bill strategic plan information and performance measurement results for each agency, (ii) the Appropriations Committee of the House of Delegates and the Finance Committee of the Senate to include agency-strategic plan information and performance measurement results when considering the budget. The bill further deletes the requirement for the Department of Planning and Budget to submit an annual report to the Appropriations Committee of the House of Delegates and the Finance Committee of the Senate setting forth strategic plan information and performance measurement results for each state agency.

BILL NUMBER: House Bill 263 Continued to 2003
PATRON: McQuigg
SUMMARY: *Campaign Finance Disclosure Act; mandatory electronic filing of reports; political committees.* Requires political committees (including PACs and political party committees subject to the Act's reporting

requirements) to file campaign finance reports electronically in accordance with State Board of Elections standards. An exception is made for county or city political party committees that file reports locally.

BILL NUMBER: House Bill 310 Enacted (c. 701)
PATRON: Howell
SUMMARY: *Access of juvenile record information.* Allows pretrial services agencies and community-corrections probation officers access to juvenile court records without a court order for the purpose of preparing pre- and post-sentence reports.

BILL NUMBER: House Bill 425 Continued to 2003
PATRON: McQuigg
SUMMARY: *Health; restaurant public disclosure system.* Provides that the provisions of the Administrative Process Act do not apply to the adoption of the FDA Food Code by the Department of Agriculture and Consumer Services and the Department of Health. The bill does require the Departments of Agriculture and Consumer Services and Health to publish an opportunity for public comment prior to adopting these regulations.

BILL NUMBER: House Bill 483 Continued to 2003
PATRON: Suit
SUMMARY: *Public comment at meetings of governing bodies and school boards.* Requires governing bodies and school boards to provide a reasonable opportunity for members of the public to comment on matters of concern prior to taking official action.

BILL NUMBER: House Bill 514 Continued to 2003
PATRON: Marrs
SUMMARY: *Library systems that access the Internet as a non-public forum.* Declares that any public-owned system that accesses the Internet is a nonpublic forum and affords library boards and governing bodies authority to take the steps necessary to limit library access to the Internet.

BILL NUMBER: House Bill 533 Continued to 2003
PATRON: Devolites
SUMMARY: *Unsolicited commercial electronic mail; prohibitions; penalties.* Prohibits sending unsolicited commercial electronic mail to persons if it uses a third party's domain name without permission; contains false or forged transmission information; contains false or misleading information in the subject line or if the person indicates that he does not wish to receive commercial electronic mail from the sender. The bill requires the sender to identify the message as an advertisement or solicitation; provide notice of the right to decline to receive further

unsolicited commercial electronic mail messages from the sender; provide a valid physical address; and provide a valid return electronic mail address for receiving requests to not receive further unsolicited commercial electronic mail messages from the sender. The bill allows interactive service providers to block commercial electronic mail sent in violation of this chapter and provides immunity from liability for such actions taken in good faith. This bill provides relief to an injured person for actual damages or the lesser of \$10 for each unsolicited bulk e-mail message or \$25,000 per day and states that the injured person shall not have a cause of action against an interactive computer service provider that merely transmits the e-mail message. The Attorney General, or attorney for the Commonwealth or attorney for a locality may bring an action to enforce these provisions. The purpose of the bill is to curb a practice known as "spamming," the sending of unsolicited commercial e-mail to unsuspecting recipients. This bill does not include provisions regarding falsifying transmission or routing information that are included in the Virginia Computer Crimes Act.

BILL NUMBER: House Bill 537 **Failed in committee**
PATRON: Devolites
SUMMARY: *Remedies; legal notice.* Requires that in order for a legal notice published in a newspaper to meet the statutory standard, it must be published in the Commonwealth of Virginia. A newspaper shall be deemed published in the Commonwealth if it maintains its principal office in the Commonwealth for the purposes of gathering news, soliciting advertisements and determining the newspaper's form and content, and if it is printed in the Commonwealth.

BILL NUMBER: House Bill 555 **Failed in committee**
PATRON: Jones, S.C.
SUMMARY: *Campaign Finance Disclosure Act; mandatory electronic filing of reports.* Requires General Assembly candidates, who receive more than \$10,000 in contributions, to file campaign finance reports electronically in accordance with State Board of Elections standards; and requires political committees (including PACs and political party committees subject to the Act's reporting requirements) that receive more than \$25,000 in contributions to file campaign finance reports electronically in accordance with State Board of Elections standards. This proposal incorporates recommendations of the Joint Subcommittee Studying Campaign Finance Reform pursuant to SJR 393 (2001).

BILL NUMBER: House Bill 558 **Enacted (c. 487)**
PATRON: Jones, S.C.
SUMMARY: *Political advertisements; disclosure requirements.* Requires that print, television, and radio advertisements supporting or opposing the nomination or election of clearly identified candidates contain specific

information regarding the sponsor of the advertisement. This bill is patterned after the North Carolina "Stand By Your Ad Act." Incorporates HB 1041.

BILL NUMBER: House Bill 564 **Enacted (c. 133)**
PATRON: Byron
SUMMARY: *Driver's licenses; use of social security numbers.* Requires the Department of Motor Vehicles to assign to applicants for driver's licenses driver's license numbers that are not social security numbers, except when applicants request in writing that their social security numbers be used as their driver's license numbers. Incorporates HB 542.

BILL NUMBER: House Bill 602 **Continued to 2003**
PATRON: Black
SUMMARY: *Children's Internet Protection; public libraries.* Requires the library board or governing body of a library to select a technology for its computers that are accessible to children and have Internet access to filter or block Internet access through such computers to child pornography, obscenity and materials deemed harmful to juveniles as defined in Title 18.2. This bill requires the library board or governing body to certify compliance with these provisions to the Librarian of Virginia along with the filing of the acceptable use policy, which is already required.

BILL NUMBER: House Bill 675 **Enacted (c. 637)**
PATRON: Reese
SUMMARY: *Clerks fees; information technology fee.* Provides an exception where a clerk has implemented a technology plan approved by the Department of Technology Planning allowing allocations to exceed the pro rata share of the collections of the three-dollar fee relative to the chancery and law actions filed in that jurisdiction.

BILL NUMBER: House Bill 753 **Continued to 2003**
PATRON: Amundson
SUMMARY: *Campaign Finance Disclosure Act; electronic filings; database.* Requires the State Board to make information from campaign finance disclosure reports filed by candidates for the General Assembly, Governor, Lieutenant Governor, and Attorney General available on the Internet within 24 hours of receipt of the reports by the State Board.

BILL NUMBER: House Bill 812 **Continued to 2003**
PATRON: Almand
SUMMARY: *Electronic dissemination of public records.* Requires that all personal information of law-enforcement officers (including names, addresses,

telephone numbers and social security numbers) be redacted from records of the circuit courts and tax documents (including real property assessments) that are made public by means of display on the Internet. Incorporated HB 532.

BILL NUMBER: House Bill 823 **Enacted (c. 247)**
PATRON: Nixon
SUMMARY: *Secretary of Technology; security audits; government databases.* Requires the Secretary of Technology to develop policies, procedures and standards for conducting audits of government databases and data communications. The Secretary is also required to direct an appropriate entity to conduct periodic audits of all executive branch agencies and institutions of higher education regarding security procedures for protecting government databases and data communications. The designated entity may contract with a private firm or firms in completing this task. All government entities subject to such audits are to fully cooperate with the designated entity. This responsibility was originally given to the Governor; this bill repeals those sections and transfers the responsibility to the Secretary of Technology.

BILL NUMBER: House Bill 884 **Enacted (c. 253)**
PATRON: Hamilton
SUMMARY: *Standards of Quality; reporting.* Directs the Board of Education to include, in its annual fall report on public education needs and schools failing to meet the Standards of Quality (SOQ), a complete listing of the current SOQ, justification for each standard, how long each such standard has been in its current form, and whether the Board recommends any changes to the SOQ. See also SB 350 (c. 159).

BILL NUMBER: House Bill 1021 **Enacted (c. 489)**
PATRON: Marshall, D.W.
SUMMARY: *Local telecommunications services.* Provides that any certificate for local exchange service or interexchange service granted by the SCC after July 1, 2002, shall be for service throughout the Commonwealth. Each local exchange carrier that was certificated before July 1, 2002, to provide service in part of the Commonwealth shall be certificated to provide local exchange service throughout the Commonwealth beginning September 1, 2002. The bill authorizes any county, city or town that operates an electric distribution system to provide telephone services within any locality in which it has electric distribution system facilities as of March 1, 2002, if the locality obtains a certificate for such service from the SCC and complies with all applicable laws and regulations for the provision of competitive telecommunications services. A county, city or town that does not obtain a certificate to provide telephone services may offer qualifying telecommunications services, including high-speed data service and Internet access service,

upon application to the SCC. The SCC shall approve such a petition if it is in the public interest, and if the proposed services are not available in quantity, quality, and price from three or more providers in the proposed geographic area. See also SB 245.

BILL NUMBER: House Bill 1112 **Continued to 2003**
PATRON: Plum
SUMMARY: *Telephone Privacy Protection Act; Do-Not-Call List.* Prohibits telephone solicitors from making telephone solicitation calls to persons who are included on a Do-Not-Call List of persons who do not wish to receive telephone solicitations. The Office of Consumer Affairs in the Department of Agriculture and Consumer Services will contract with a non-profit organization qualifying as a list administrator to maintain the Do-Not-Call List.

BILL NUMBER: House Bill 1209 **Enacted (c. 299)**
PATRON: Cox
SUMMARY: *Clerk of circuit court; military service discharge records.* Provides that discharge certificates and reports of separation from active duty recorded with the clerk of circuit court shall be open for inspection and copying only by (i) the subject of the record, (ii) the conservator or guardian of the subject, (iii) the executor or administrator of the subject's estate, (iv) representatives acting on behalf of or at the request of the subject, or (v) any agency of federal, state, or local government. The bill also provides that the clerk may permit the use of discharge certificates or reports of separation from active duty for bona fide research purposes if the subject of the record is deceased.

BILL NUMBER: House Bill 1221 **Enacted (c. 821)**
PATRON: Albo
SUMMARY: *Cigarette tax; sale of cigarettes produced for export.* Requires the Tax Department to maintain for at least three years information identifying the wholesale or retail dealer who affixed the revenue stamps to the cigarettes.

BILL NUMBER: Senate Bill 28 **Enacted (c. 2)**
PATRON: Trumbo
SUMMARY: *Division of Legislative Services and Legislative Automated Systems; access to information.* Provides that the Clerks of the House of Delegates and Senate will have access to floor substitutes, conference committee reports and substitute bills accompanying a conference committee report as soon as the bills and reports are drafted; however, neither shall access the electronic file containing such documents until the legislation is offered for introduction in either house. This bill also makes certain housekeeping changes in the Code section to conform to current practice.

BILL NUMBER: Senate Bill 59 **Enacted (c. 38)**
PATRON: Watkins
SUMMARY: *Board of Medicine.* Revises the statute that sets forth the data required for the profiles of doctors of medicine, osteopathy, and podiatry. The Board will require telephone numbers and access to translating services for all practice settings, and will remove the mandatory reporting of insurance participation while allowing voluntary reporting of this information. For the sole purpose of expedited dissemination of information about a public health emergency, doctors must also provide any e-mail addresses or facsimile numbers. The e-mail addresses and facsimile numbers will not be published on the profile database or released or made available for any other purpose other than the public health emergency. In addition, the scope of data to be made available on malpractice claims has been clarified to prohibit the release of specific numeric values of reported paid claims in any individually identifiable manner under any circumstances. This bill has numerous technical amendments to change references to "physicians" to the more accurate term "doctor." A second enactment clause requires the Board of Medicine to promulgate emergency regulations and a provision for the display of final disciplinary orders of the Board together with notices thereof and any summary suspension of a license.

BILL NUMBER: Senate Bill 83 **Enacted (c. 140)**
PATRON: Wampler
SUMMARY: *Technology Trust Fund fee; sunset.* Extends the sunset from July 1, 2002, to July 1, 2004. See also HB 857 (c. 250).

BILL NUMBER: Senate Bill 144 **Failed in committee**
PATRON: Ticer
SUMMARY: *Campaign Finance Disclosure Act; mandatory electronic filing of reports; political committees; television advertisements.* Requires political committees (including PACs and political party committees subject to the Act's reporting requirements) that expend \$50,000 or more on televised political advertisements in any 12-month period to file campaign finance reports electronically in accordance with State Board of Elections standards. The bill also requires such committees to file reports on additional expenditures for television advertisements within 24 hours of the airing of the advertisement.

BILL NUMBER: Senate Bill 153 **Enacted (c. 832)**
PATRON: Norment
SUMMARY: *Circuit court clerks.* Makes various revisions to the duties and responsibilities of filings, etc., in the circuit court clerks' offices such as: clarifying the limitations on public access to social security numbers; authorizing localities to supplement clerks salaries; giving authority to clerks to sign prisoner transportation orders when authorized by the

judge; providing for the disposition of original wills after microfilming; removing the reference to abstracts of executions on judgments that no longer have to be filed; clarifying that partial certificates of satisfaction are to be indexed; deleting obsolete references to fees for applications for tax deeds; clarifying procedure for filing requests for copies of certificates of analysis in criminal cases; requiring court orders to specifically identify the human biological evidence to be preserved in a criminal case; clarifying the fees payable on petitions for approval of proposed distributions from minors' estates; and waiving application fees for deputy circuit court clerks seeking appointment as notaries public.

BILL NUMBER: Senate Bill 264

Enacted (c. 835)

PATRON: Lambert

SUMMARY: *Sharing of protected health information between state agencies.*

Declares the coordination of prevention and control of disease, injury, or disability and the delivery of health care benefits to be (i) necessary public health activities; (ii) necessary health oversight activities for the integrity of the health care system; and (iii) necessary to prevent serious harm and serious threats to the health and safety of individuals and the public. The Departments of Health, Medical Assistance Services, Mental Health, Mental Retardation and Substance Abuse Services, and Social Services must establish a secure system for sharing protected health information that may be necessary for the coordination of prevention and control of disease, injury, or disability and the delivery of health care benefits when such protected information concerns individuals who (a) have contracted a reportable disease, including exposure to a toxic substance, as required by the Board of Health pursuant to § 32.1-35 or other disease or disability required to be reported by law; (b) are the subjects of public health surveillance, public health investigations, or public health interventions or are applicants for or recipients of medical assistance services; (c) have been or are the victims of child abuse or neglect or domestic violence; or (d) may present a serious threat to the health or safety of a person or the public or may be subject to a serious threat to their health or safety. Pursuant to the regulations concerning patient privacy promulgated by the federal Department of Health and Human Services, covered entities may disclose protected health information to the secure system without obtaining consent or authorization for such disclosure. Such protected health information will be used exclusively for the purposes established in this section. The Office of the Attorney General will advise the Departments of Health, Mental Health, Mental Retardation and Substance Abuse Services, and Medical Assistance Services in the implementation of this section. This provision also amends the patient health records privacy statute to note that providers may make subsequent disclosures of patient records as permitted under

the federal Department of Health and Human Services regulations relating to the electronic transmission of data and patient privacy promulgated as required by the Health Insurance Portability and Accountability Act of 1996. In addition, providers may disclose the records of a patient as authorized by law relating to public health activities, health oversight activities, serious threats to health or safety or abuse, neglect or domestic violence or as necessary to the coordination of prevention and control of disease, injury, or disability and delivery of health care benefits pursuant to the secure system for sharing protected health information.

BILL NUMBER: Senate Bill 329 **Failed in House**
PATRON: Wagner
SUMMARY: *Campaign Finance Disclosure Act; elections to which the Act applies.* Expands coverage of the Act to town elections in towns of 10,000 or more population. The present law applies only to towns of 25,000 or more population. Under the 2000 census, Blacksburg and Leesburg have populations of 25,000 or more. Towns of 10,000 or more include the additional towns of Herndon, Christiansburg, Vienna, and Front Royal. This proposal is a recommendation of the Joint Subcommittee Studying Campaign Finance Reform pursuant to SJR 393 (2001).

BILL NUMBER: Senate Bill 423 **Continued to 2003**
PATRON: Byrne
SUMMARY: *Telephone Privacy Protection Act.* Prohibits telephone solicitors from making telephone solicitations to persons who are included on a database of persons who do not wish to receive telephone solicitations. The Office of Consumer Affairs in the Department of Agriculture and Consumer Services will maintain the database and provide copies to telephone solicitors for a \$10 annual fee. Persons may be placed on the database upon written notice and payment of a \$10 registration fee and a five-dollar annual renewal fee. Violations of the Telephone Privacy Protection Act are a prohibited practice under the Consumer Protection Act and are subject to the enforcement provisions of the Virginia Consumer Protection Act, except that private actions for damages are set at \$500 per violation, which may be increased, in the court's discretion, to an amount not exceeding \$1,500. Telephone companies are required to notify customers about the database and their rights under the Act. The measure also prohibits telephone solicitors from using a predictive automated dialing system to make a telephone solicitation if a telephone call generated by such system does not immediately connect the person answering the telephone call with an individual who is the telephone solicitor or an employee or agent of the telephone solicitor.

BILL NUMBER: Senate Bill 454 **Failed in committee**
PATRON: Puller
SUMMARY: *Adult protective services registry.* Establishes the adult protective services registry, which shall contain a listing of any person employed by a facility licensed or funded by the Departments of Health, Social Services, or Mental Health, Mental Retardation or Substance Abuse Services who has abused, neglected or exploited a person who is incapacitated or 60 years of age or older, when that abuse, neglect or exploitation resulted in a local department of social services' determination that such person had or has need of protective services. Applicants for employment at nursing homes, assisted living facilities, mental health, mental retardation and substance abuse programs and facilities are required to obtain a search of the adult protective services registry for a record of any investigation of adult abuse, neglect or exploitation undertaken on the applicant. The adult protective services registry is to be maintained by the Adult Protective Services Unit of the Department of Social Services.

BILL NUMBER: Senate Bill 551 **Cont'd to 2003**
PATRON: Stolle
SUMMARY: *Conflicts of Interest Act; Lobbyist disclosure forms.* Requires the Secretary of the Commonwealth, the Clerk of the House of Delegates, and the Clerk of the Senate of Virginia jointly to develop a uniform conflicts of interest form for filings required by Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2 and Chapter 13 (§ 30-100 et seq.) of Title 30, and lobbyist disclosure reports required by § 2.2-426. The bill also requires the Secretary of the Commonwealth, the Clerk of the House of Delegates, and the Clerk of the Senate of Virginia jointly to make such filings available on the Internet. The bill also contains technical amendments and has a delayed effective date of January 1, 2003.

BILL NUMBER: Senate Bill 567 **Continued to 2003**
PATRON: Byrne
SUMMARY: *Unsolicited commercial electronic mail; prohibitions; penalties.* Prohibits sending unsolicited commercial electronic mail to persons if it uses a third party's domain name without permission; contains false or forged transmission information; contains false or misleading information in the subject line or if the person indicates that he does not wish to receive commercial electronic mail from the sender. The bill requires the sender to identify the message as an advertisement or solicitation; provide notice of the right to decline to receive further unsolicited commercial electronic mail messages from the sender; provide a valid physical address; provide a valid return electronic mail address for receiving requests to not receive further unsolicited commercial electronic mail messages from the sender. The bill allows interactive service providers to block commercial electronic mail sent in violation of this chapter and provides immunity from liability for

such actions taken in good faith. This bill provides relief to an injured person for actual damages or the lesser of \$100 for each unsolicited bulk e-mail message or \$25,000 per day and states that the injured person shall not have a cause of action against an interactive computer service provider that merely transmits the e-mail message. The Attorney General or, attorney for the Commonwealth or attorney for a locality may bring an action to enforce these provisions. The purpose of the bill is to curb a practice known as "spamming," the sending of unsolicited commercial e-mail to unsuspecting recipients. This bill does not include provisions regarding falsifying transmission or routing information that are included in the Virginia Computer Crimes Act.

BILL NUMBER:	Senate Bill 669	Enacted (c. 812)
PATRON:	Williams	
SUMMARY:	<i>Workers' compensation; proof of insurance coverage.</i> Permits an employer who provides proof of insurance coverage to the Workers' Compensation Commission to have his insurance carrier make such a filing. The filing requirement shall be satisfied if proof of coverage includes the insured's name, address, employer identification number, policy number, dates of insurance coverage, and the insurer's name, address and identification number. Proof of coverage filed by an insurance carrier or rate service organization shall not be aggregated with proof of coverage filed by or on behalf of other employers.	

