

REPORT OF THE

**Virginia Freedom of Information
Advisory Council**

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



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VIRGINIA FREEDOM OF INFORMATION
ADVISORY COUNCIL**

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THE GENERAL ASSEMBLY OF VIRGINIA**

COMMONWEALTH OF VIRGINIA
DECEMBER 2005

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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 2005**

INTRODUCTION

"The laws and customs that anchor open government...are most at risk when insecure times such as these breed the illusion that if only information and ideas could be rationed to the few and withheld from the many, then our people would be made stronger by their ignorance, more alert by their blinkered vision, more united by their isolation."

Editorial, *Editor & Publisher*,
2003

Established by the 2000 Session of the General Assembly¹, the Virginia 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 advisory opinions concerning FOIA upon request of 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 FOIA². 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 composed 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

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*.

of local government; two representatives of the news media; and four citizens.

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 assist in the resolution of disputes and keep the parties in compliance with FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council serves as a forum for the discussion, study, and resolution of FOIA and related public access issues and for its application of sound public policy considerations to resolve disputes and clarify ambiguities in the law. Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.

EXECUTIVE SUMMARY

During this reporting period, December 1, 2004 to December 1, 2005, the Council undertook two studies resulting from the examination of three bills referred to the Council by the 2005 Session of the General Assembly³ that did not advance during the 2005 legislative session. Council-formed subcommittees included a PPEA/PPTA⁴ Subcommittee to study the issues raised by HB 2672 and an Electronic Meetings Subcommittee to review the issues raised by HB 2670. HB 2672 (Delegate Plum) would have amended an existing meeting exemption to allow for closed meetings to discuss records exempt from public disclosure relating to the Public-Private Education Facilities and Infrastructure Act (PPEA). The PPEA/PPTA Subcommittee, while not recommending HB 2672 as written, examined the concern that the current record exemption for PPEA and PPTA proposals was being improperly applied, resulting in the withholding of more records than is authorized under the current FOIA⁵ exemption. The work of the PPEA/PPTA Subcommittee resulted in recommended legislation to the Council for the 2006 Session of the General Assembly that would (i) clarify what PPEA/PPTA records are exempt under FOIA, (ii) require a formalized process between a public body and private entity to designate trade secrets, financial records, and other records submitted by a private entity to protect the financial interest or competitive position of the parties, and (iii) make conceptual proposals and proposed interim and/or comprehensive agreements publicly available before such agreements become binding. HB 2760 (Delegate Reese) would have allowed local public bodies to conduct meetings under FOIA through electronic communication means (telephone or audio/visual)⁶. Currently, only state public bodies may conduct meetings in this manner. The Electronic Meetings Subcommittee examined the feasibility of expanding the authorization for the conduct of electronic communication meetings to local public bodies and voted not to recommend HB 2760 in light of the significant relaxation of the

³ HB 1733 (Delegate Cosgrove), HB 2672 (Delegate Plum), and HB 2760 (Delegate Reese).

⁴ The Public-Private Education Facilities and Infrastructure Act of 2002, (§ 56-575.1 et seq.) and the Public-Private Transportation Act of 1995, (§ 56-556 et seq.).

⁵ The Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

⁶ Section 2.2-3708.

procedural requirements made to § 2.2-3708 by the 2005 Session of the General Assembly. Further, the Electronic Meetings Subcommittee recommended that the issue be revisited in 2006 after some experience with the new rules governing electronic meetings.

As of this writing, the Council is considering two pieces of legislation to recommend to the 2006 Session of the General Assembly.⁷ The first legislative proposal would add a mandated fifth response to a FOIA request--the requested records do not exist or cannot be located after diligent search. Currently under FOIA, a public body is under no obligation to create records that do not exist in response to a specific request nor is a public body required to respond to a requester if the requested record does not exist or cannot be found. The lack of a required response in these instances leads to confusion and exacerbates any feelings of distrust. The Council, in a written opinion (AO-16-04) has previously opined that a public body should make this written response where applicable in order to avoid confusion and frustration on the part of the requester. The second legislative proposal relates to public access to procurement records under the PPEA and PPTA, discussed above.

The Council was successful in seeing its 2005 legislative recommendation enacted into law in 2005. Specifically, SB 711 (Houck), recommended by the Council resulted in significant relaxation of the procedural rules for the conduct of electronic meetings⁸ by state public bodies, including reduced notice of such meetings, elimination of the limitation of the number of meetings that may be conducted electronically, and elimination of the requirement that an audio or audio/visual recording of any such meeting be retained. SB 711 was incorporated into the nearly-identical bill recommended by the Joint Commission on Technology and Science (JCOTS), SB 1196 (Newman). SB 1196/SB711 passed as a joint recommendation of the Council and JCOTS.

The Council continued to monitor Virginia Supreme Court decisions relating to FOIA. In *Cartwright v. Commonwealth Transportation Commissioner of Virginia*, 270 Va. 58; 613 S. E. 2d 449; 2005 Va LEXIS 62, decided June 9, 2005, the issue before the court was whether the circuit court (in Chesapeake) erred in denying a petition for a writ of mandamus⁹ brought in accordance with FOIA (§ 2.2-3713) on the ground that the petitioner had an adequate remedy at law. The Supreme Court noted that this was the first time that it had considered whether a writ of mandamus filed as specifically authorized in FOIA may

⁷ The Council will meet on December 29, 2005 to take final action on its two legislative proposals.

⁸ SB1196/711 reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually; (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707; (iii) allows for the conduct of closed meetings during electronic meetings; (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science; and (v) expands the type of information required to be reported. The bill specifies that regular, special, or reconvened sessions of the General Assembly held pursuant Article IV, Section 6 of the Constitution of Virginia are not meetings for purposes of the electronic communication meeting provisions. The bill also defines "electronic communication means."

⁹ Writ of mandamus is used to compel a public official to perform a ministerial duty imposed on him by law.

be denied because of the availability of another adequate remedy at law. The facts that gave rise to the case involved a FOIA request made by a citizen for particular documents prepared by the Virginia Department of Transportation (VDOT). The FOIA request was denied. The Court held that the circuit court erred in denying the petition for mandamus. In its decision, the Court stated, "We hold that a citizen alleging a violation of the rights and privileges afforded by the FOIA and seeking relief by mandamus pursuant to Code § 2.2-3713 (A) is not required to prove a lack of adequate remedy at law, nor can the mandamus proceeding be barred on the ground that there may be some other remedy at law available."

The Council also kept abreast of the ongoing FOIA disputes between Lee Albright, a Nelson County citizen, and the Virginia Department of Game and Inland Fisheries (VDGIF). Mr. Albright advised the Council of his attempts to get records from VDGIF and of the need to file lawsuits to gain access to the requested records. He discussed the favorable outcome of his most recent FOIA suit against VDGIF for violation of FOIA. Mr. Albright indicated that he had received advisory opinions from the Council on this issue, but unfortunately, those opinions did not seem to influence the Department's actions. Mr. Albright expressed concern that a lawsuit was the only remedy under FOIA to force a public body to comply with the law. The members of the Council shared Mr. Albright's concern that citizens should not have to endure the difficulties Mr. Albright has encountered, especially in light of the mandatory disclosure requirements of FOIA. The Council examined the issue of whether FOIA should be amended to provide additional remedies for violation¹⁰. The Council determined that no action was required as the occurrence was an aberration when considered as a whole and that ultimately, the remedies available under FOIA proved sufficient to redress violations committed by a public body thereby reaffirming the citizens' right of access to government records.

The Council continued its commitment to developing and updating quality educational materials on the application and interpretation of FOIA for dissemination to the public. This year, the Council developed two new guides to ensure compliance with the provisions of FOIA concerning allowable charges for record production and a primer on conducting electronic meetings. *"Taking the Shock out of FOIA Charges; a guide to allowable charges for record production under the Freedom of Information Act"* attempts to provide much-needed guidance on how to correctly assess charges under FOIA to ensure compliance with the letter of the law as well as the spirit of the law. This new pamphlet served as the basis for a training segment on charges at the 2005 FOIA Workshops. The primer on electronic meetings (teleconferencing and audio/visual) provided the user with a "how to" guide to comply with the requirements for the conduct of these technology-based meetings. Both new guides are available on the Council's website.

The Council continued its commitment to FOIA training. The annual FOIA workshops, approved by the Virginia State Bar for continuing legal education credit, the Department of Criminal Justice Services for law-enforcement credit, and the Virginia School Board Association for academy points, were held in Abingdon, Harrisonburg, Fairfax, Richmond

¹⁰ Excerpted from a memorandum written by Alan Gernhardt, Staff Attorney to the Council dated August 31, 2005 detailing the experiences of a citizen, Lee Albright, in seeking records from the Virginia Department of Game and Inland Fisheries.

and Norfolk and reached approximately 350 persons statewide, including government officials, media representatives and citizens. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the last two years as a sign that its basic training mission had been successfully accomplished. The Council welcomed the opportunity to provide other relevant training programs to meet the needs of government officials, the media, and citizens alike. Statewide workshops will continue to be offered in odd-numbered years to provide training to new public officials and employees. In even-numbered years, the Council will provide a forum to address topic-specific issues such as public access in light of HIPPA¹¹, the Patriot Act, and other federal and state laws. In addition to the 2005 statewide FOIA workshops, the Council was requested to conduct 47 specialized training programs throughout Virginia for various groups, agencies of state and local government, and others interested in receiving FOIA training. These specialized programs are tailored to meet the needs of the requesting organization and are provided free of charge. This year, the Council is pleased to announce that all of its training programs, whether the annual workshops or specialized programs, have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys.

For this reporting period, the Council, with a staff of two attorneys, responded to over 1,600 inquiries. Of these inquiries, 16 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: 4 by government officials, 11 by citizens, and 1 by media. The remaining 1,652 requests were for informal opinions, received via telephone and e-mail. Of the 1,652 requests, 756 were made by government officials, 687 by citizens, and 209 by media.

March 2005 marked the observance of *Sunshine Week* statewide, which resulted in various articles and reports by print and broadcast media to inform the public of its right to know. As a result of the 2005 *Sunshine Week*, there has been increased awareness of the Council, its role, and FOIA generally. Virginia is ranked as one of the top ten states for effective FOIA laws. Plans for a 2006 *Sunshine Week* are being made and in 2006, will include active participation by the Council to raise the public's awareness of its right to know about the operation of government.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period in which it considered a broad range of issues, including the appropriateness of adding a fifth mandated response to FOIA requests, public access to PPEA/PPTA procurement records, the adequacy of remedies for FOIA violations, and the expansion of authorization for the conduct of electronic communication meetings to local and regional public bodies. A condensed agenda for each of the Council's meetings appears as Appendix D. The Council's discussions and deliberations are chronicled below.

¹¹ The federal Health Insurance Portability and Accountability Act.

March 23, 2005

The Council held its first quarterly meeting of 2005¹². The purpose of the meeting was to review legislative changes to FOIA made by the 2005 General Assembly, identify topics for study, including bills referred to the Council for further examination, and to develop a study plan for this year's work.

Legislative Update

The 2005 Session of the General Assembly passed a total of 12 bills amending FOIA. SB 711 (Houck), recommended by the Council amended the requirements for electronic meetings¹³. SB 711 was incorporated into the nearly-identical bill recommended by the Joint Commission on Technology and Science (JCOTS), SB 1196 (Newman). SB 1196/SB711 passed as a joint recommendation of the Council and JCOTS. Of the 12 bills, six bills created new record exemptions to FOIA: HB 2399 added an exemption for 911 or E-911 subscriber data collected by local governing bodies; HB 2729 added an exemption for records of active investigations conducted by the Department of Criminal Justice Services of certain of its licensees; HB 2404 added an exemption for proprietary records of local wireless service authorities; SB 959 added an exemption for proprietary records of local public bodies providing telecommunications and cable television services; HB 2032 added an exemption for the Statewide Alert Network program records; and SB 1157 added an exemption for records of the Judicial Inquiry and Review Commission. Two of these six, HB 2404 and SB 959, also create new closed meeting exemptions corresponding to their respective records exemptions.

In addition to SB 1196/SB 711 discussed above, four other bills amended current exemptions under FOIA: HB 2516 and SB 1109, which are identical, made technical amendments to existing provisions concerning minors' health records; SB 1023 made a technical amendment to the existing provision concerning involuntary admission records as part of the re-codification of Title 37.1 as Title 37.2; and SB 752 extended the sunset provision for electronic meetings held by the Board of Visitors of the University of Virginia.

One other bill, HB 2930, addressed voting security matters involving the State Board of Elections and local electoral boards, and also created a new closed meeting exemption within FOIA. In amending Title 24.2 (election laws), HB 2930 also exempted certain

¹² Council members Griffith, Axselle, Edwards, Fifer, Hallock, Hopkins, Miller, Moncure, Wiley and Yelich were present. Council members Houck and Bryan were absent.

¹³ SB1196/711 reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually; (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707; (iii) allows for the conduct of closed meetings during electronic meetings; (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science; and (v) expands the type of information required to be reported. The bill specifies that regular, special, or reconvened sessions of the General Assembly held pursuant Article IV, Section 6 of the Constitution of Virginia are not meetings for purposes of the electronic communication meeting provisions. The bill also defines "electronic communication means."

records from disclosure under FOIA and provided that "site visits" are not "meetings" subject to FOIA. A complete listing and description of FOIA and other related access bills considered by the 2005 Session of the General Assembly is available on the Council's website and is attached to this report as Appendix E.

Bills Referred to the Council for Study

The following three bills were referred to the Council for study by the 2005 Session of the General Assembly:

HB 1733 (Cosgrove); Freedom of Information Act; record exemption for certain email addresses. Revises a current exemption for personal information, including electronic mail addresses, to allow the withholding of such information unless the subject of the record waives the protections afforded by the exemption. Currently, the presumption is that the record is open unless the subject of the record indicates that the record should not be released.

HB 2672 (Plum); Virginia Freedom of Information Act; meetings exemption. Amends an existing meeting exemption to allow for closed meetings to discuss records exempt from public disclosure relating to the Public-Private Education Facilities and Infrastructure Act (PPEA).

HB 2760 (Reese); Freedom of Information Act (FOIA); electronic meetings. Allows local public bodies to conduct meetings under FOIA through electronic communication means (telephone or audio/visual). Currently, only state public bodies may conduct meetings in this manner.

The Council discussed the issues raised by each bill. The Council was advised that Delegate Plum had requested a representative of the Virginia Information Technologies Agency (VITA) to present the HB 2672 on his behalf. In requesting that HB 2672 be referred to the Council, Delegate Plum wrote that the bill was introduced to address a need brought to his attention by the Information Technology Investment Board, which wanted to meet in closed session to discuss confidential proprietary records submitted to VITA as part of a procurement proposal under the PPEA. Inclusion of such discussions under the PPEA would expand the current closed meeting exemption now available to public bodies under the PPTA. The Virginia Press Association (VPA) stated that it had no problem with the bill itself, but was concerned with how the current record exemption for PPEA and PPTA proposals was used to withhold more records than are authorized under the exemption. This concern was also shared by the Virginia Coalition for Open Government and the Associated General Contractors of Virginia. The Council agreed to appoint a subcommittee consisting of Council members Axelle, Edwards, and Hallock to examine the issues identified. It was mentioned that in connection with SB 1107 (Stosch), a work group would be formed to revise the model guidelines for the PPEA. The Council directed staff to monitor the SB 1107 work group and report to the Council subcommittee on HB 2672.

With regard to HB 2760, the Council was advised that the patron, Delegate Reese, who was unable to attend this meeting, wanted an opportunity to discuss HB 2760 with the Council at its next meeting. The Council appointed a subcommittee consisting of Council members Edwards, Fifer, Miller and Wiley to discuss the appropriateness of expanding authorization for the conduct of electronic meetings to local regional authorities and other local public bodies.

Other Business

Staff raised several issues for the Council's consideration. The first issue concerned whether a mandated fifth response to a FOIA request--the requested records do not exist--was needed. Currently under FOIA, a public body is under no obligation to create records that do not exist in response to a specific request nor is a public body required to respond to a requester if the requested record does not exist. The lack of a required response in these instances leads to confusion and exacerbates any feelings of distrust. The Council, in a written opinion (AO-16-04) has previously opined that a public body should make this written response where applicable in order to avoid confusion and frustration on the part of the requester. The Council directed staff to examine this issue more fully and present a proposal for the Council's consideration.

The next issue discussed was the production of public records under FOIA versus the production of public records under licensing agreements with VITA. When the Virginia Information Providers Network Authority (VIPNET)¹⁴ was originally created, language was included that clarified the responsibilities of public bodies for the production of records made under FOIA and those "value added" records produced through VIPNET and subject to a licensing agreement with the requester. In 2003, when VITA was created, the referenced language was repealed because of the incorporation of VIPNET into VITA. During the 2005 Session, SB 1027 dissolved VIPNET as a separate division within VITA. Reinstating the original language relating to the responsibilities of public bodies to produce public records may help eliminate confusion and clarify obligations for the production of records. Staff noted that language was added to SB 1027 that may already speak to the issue of production of public records in response to a FOIA request. The relevant language in SB 1027 states that "Nothing ... shall be construed to prevent access to public records pursuant to Virginia Freedom of Information Act...under the terms and conditions set forth in § 2.2-3704." The Council agreed that clarification of the obligations of public bodies in responding to FOIA requests in light of any licensing agreements with VITA would be advisable. The Council questioned whether the solution should be a legislative one or an administrative one through training and/or production of guidance documents by the Council. The Council directed staff to work with VITA on preparing such a guidance document for dissemination to the various state and local public bodies.

The Council next discussed charges for databases under FOIA (subsection J of § 2.2-3704) and other laws, and examined the apparent disparate provisions in the Code of Virginia. (e.g. § 2.2-4008). Specifically, subsection J of § 2.2-3704 provides "Every public

¹⁴ VIPNET is a division within VITA.

body of state government shall compile, and annually update, an index of computer databases that contains at a minimum those databases created by them on or after July 1, 1997. ...Such index shall be a public record and shall include, at a minimum, the following information with respect to each database... **a schedule of fees for the production of copies in each available form.** " (Emphasis added). Section 2.2-4008, relating to availability of guidance documents under the Administrative Process Act, however, provides "...Each agency shall also (i) maintain a complete list of all of its currently operative guidance documents and make the list available for public inspection... and (iii) upon request, make copies of such lists or guidance documents available **without charge, at cost, or on payment of a reasonable fee.**" (Emphasis added). Note that the requirements under § 2.2-3704 F of FOIA are that a public body may make reasonable charges not to exceed its actual cost incurred in accessing, duplicating, supplying, or searching for the requested records. These variations in language are confusing to both public bodies and requesters alike in what is an allowable charge for the production of indices and document lists. Council staff stated that it has received many inquiries concerning allowable charges for databases. Staff suggested that one solution may be to specifically reference subsection F of § 2.2-3704, which will clarify the allowable charges for these databases and guidance documents. The Council agreed that charges for the production of public records, including databases, should be addressed uniformly in the Code of Virginia and governed by FOIA. The Council asked staff to prepare a guidance document on allowable charges for the production of public records and post it on the Council's website.

The final issue raised by staff concerned existing FOIA provisions relating to release of administrative investigations of various mental health agencies, specifically, subdivisions 3, 5, and 8 of § 2.2-3705.3 and subdivision 1 of § 2.2-3705.5. This issue came to light as staff prepared for FOIA training for the human resource personnel at the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS). One of the issues for which training was requested was the release of employee information in cases of investigations of patient abuse or neglect. The referenced exemptions all provide that reports of completed investigations were open under FOIA except for patient identifying information and the identities of persons supplying information. What was not clear was that some of the exemptions also included protection of "other individuals involved in the investigation" --other exemptions did not. Specific concerns raised by staff included (i) whether the language "or other individuals involved in the investigation" includes protection for the employee accused of the abuse or neglect and (ii) whether public policy grounds for different (although similarly focused) agencies that investigate these cases exist to explain the differing standards for release of information from inactive investigations. The Council suggested that staff confer with representatives of the Department of Mental Health, Mental Retardation, and Substance Abuse Services, the Office of the Inspector General, and the Virginia Office of Protection and Advocacy regarding their respective exemptions.

Report on Sunshine Week

The week of March 13, 2004 was designated as Sunshine Week and various articles and reports were published by the media to inform the public of its right to know. The Council heard from representatives of the print and broadcast media as well the Virginia

Coalition for Open Government (VCOG). The VPA indicated that Sunshine Week was a national multimedia effort to raise the public's awareness of its right to know about the operation of government. VPA indicated that Virginia had seven representatives on the national Sunshine Week steering committee. VPA displayed "tear sheets" from newspapers around Virginia revealing the extent and nature of the articles published on FOIA, the Council, and public access generally. The VPA reported that newspapers also used online questions and answers, editorials, and editorial cartoons as part of Sunshine Week. It was reported that newspapers are still receiving feedback from the public in the form of letters to the editors commenting on the value of the Sunshine Week. The Virginia Association of Broadcasters (VAB) commented that their membership took a two-prong approach to Sunshine Week--educating themselves about public access and educating the public. Coverage of Sunshine Week by the VAB included email updates and public service announcements on both radio and television. VCOG reported that as a result of Sunshine Week, there has been increased awareness of the Council, its role, and FOIA generally. Virginia is ranked as one of the top ten states for effective FOIA laws. Plans for a 2006 Sunshine Week are being made, including a proclamation from the Governor.

Of Note

Staff reported that for the period December 1, 2004 through March 22, 2005, it had received a total of 494 inquiries. Staff noted that this number is a significant increase when compared to previous years¹⁵. Of the 494 inquiries, 12 have been requests for formal written opinions and the remaining 482 inquiries coming from telephone and emails. Citizens accounted for 204 of the informal inquiries, the government for 198 inquiries, and the media for 75 inquiries. Of the formal opinions, the breakdown was nine requests of citizens, two from government, and one from the media.

Staff also advised that plans were being made for the Council-sponsored symposium on children's records, where the various state and local agencies holding records concerning children would make presentations about their respective records and whether release is restricted. The ultimate goal of the symposium is the compilation and publication of the various statutes relating to access to children's records. Staff also stated that planning has begun for annual statewide FOIA workshops to be held in late summer at five statewide locations.

June 15, 2005

The Council held its second quarterly meeting¹⁶ of 2005 to receive progress reports from its two subcommittees and to consider further matters discussed previously.

Subcommittee Reports

1. The Electronic Meetings Subcommittee met on June 8, 2005 to discuss the appropriateness of expanding authorization for the conduct of electronic meetings to local

¹⁵ Totals for 2004 were approximately 300 to 325 inquiries per quarter.

¹⁶ All Council members were in attendance except Mssrs. Miller and Moncure.

regional authorities and other local public bodies. House Bill 2760 (Delegate Reese) was referred to the FOIA Council for study by the 2005 Session of the General Assembly. As introduced, HB 2760 would allow all local public bodies to conduct meetings under the Freedom of Information Act (FOIA) through electronic communication means (telephone or audio/visual). Under current law, only state public bodies may conduct meetings in this manner.

Subcommittee member Roger Wiley, representing the local government perspective, told the subcommittee that obtaining a quorum for local regional authorities is a problem due to the several jurisdictions served by a regional authority and the distance between the jurisdictions and the meeting site. He indicated that some regional authorities serve as many as 18 jurisdictions. Mr. Wiley noted that reimbursement for travel and expenses is a very real cost in addition to the inefficiencies of requiring county and city executives to spend one-half day just in travel to and from regional meetings. He pointed out that service on a regional authority is a very ancillary duty when compared with the principal responsibilities of county and city executives. He noted that the practical effect of restricting the use of available technology is forcing inefficiency on local government while at the same time complaining that local government should operate more like a business. Mr. Wiley also remarked that there is more public interest in some issues dealt with by regional authorities (i.e. transportation) than regional jail authorities, for example. In addition, with traffic congestion in the metropolitan areas of the state, it is increasingly difficult to get good people to serve in the public sector. Mr. Wiley reported that the Virginia Municipal League and the Virginia Association of Counties had suggested the appointment of lower echelon personnel to regional authority boards as a way to eliminate the problem of obtaining a quorum on the theory that they would not be as busy as a city manager. The experience however did not bear this out and the problem persists. Mr. Wiley indicated that it is a source of frustration when local officials appointed to the board of a regional authority are away on business or for personal reasons on the day of a board meeting. Allowing them to participate electronically would alleviate scheduling conflicts and improve attendance. As it stands now, such an official would have to miss the meeting. The subcommittee was asked to consider allowing a minority of a regional authority board to meet by electronic means, but to require the quorum of the board to be physically present at the meeting site.

VCOG indicated that its board of directors expressly opposed the expansion of the authorization for the conduct of electronic meetings to local governing bodies or local regional authorities. Because of the substantial rewrite of the electronic meetings statute in 2005, time was needed to gain experience and collect data under the new rules for electronic meetings. It was noted that as new communication technologies are developed, there is more opportunity for abuse of open meeting principles.

The VPA concurred with the remarks of VCOG although it stated that it was aware of the imposition on individual members of local public bodies. However, the membership of the VPA has expressed opposition to any further loosening of electronic meeting rules in light of the significant concessions made in the law in 2005. It was noted that with electronic meetings there is less interaction among the members of the public body and that visual cues

such as body language are lacking. Mr. Wiley protested that such notions further the premise that local government officials are the "bad guys" and state officials are not.

Expansion of the use of electronic meetings to local regional authorities is viewed as premature in light of the changes to the electronic meetings law in 2005. Electronic meetings were first authorized in 1984 and no significant amendment has been made until 2005. At that time, the rules for the conduct of these meetings were substantially relaxed. Any further expansion at this time was perceived as the camel's nose under the tent. Additionally, allowing local regional authorities to conduct electronic meetings would not solve the problem of establishing a quorum as the current law requires a quorum of a state public body to be physically assembled at the main meeting location.

A representative of Stafford County suggested that perhaps a pilot project involving a regional authority may be in order. The idea was to allow a designated regional authority to meet electronically and report its experiences with electronic meetings. In lieu of creating a pilot project, it was suggested that regional authorities consider rotating the meeting locations among the member jurisdictions. It was noted the most regional authorities meet between four and six times per year and that rotation of the meeting sites would spread the burden of travel among the participating jurisdictions.

Another issue was raised concerning clarification of which public bodies may conduct electronic meetings. Currently § 2.2-3708 provides that "[I]t shall be a violation of this chapter for **any political subdivision** or any governing body, authority, board, bureau, commission, district or agency of local government or any committee thereof to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled." (Emphasis added). It was noted that the general understanding of § 2.2-3708 is that state public bodies may conduct electronic meetings while units of local government may not. However, state authorities are political subdivisions as stated in their enabling legislation. The question is whether they are precluded from conducting electronic meetings.

2. The PPEA Subcommittee met on June 8, 2005 to discuss the current FOIA records exemption found at § 2.2-3705.6 (11). This subcommittee was created as a result of HB 2672 (Delegate Plum), which was referred to the FOIA Council for study by the 2005 General Assembly. The reason for referral to the FOIA Council and hence the creation of a subcommittee was not so much a problem with the bill itself, but concern about how the current record exemption for PPEA and PPTA proposals was used to withhold more records than are authorized under the exemption. This concern was also shared by the Virginia Coalition for Open Government and the Associated General Contractors of Virginia.

It was brought to the subcommittee's attention that there were four localities where problems existed concerning excessive secrecy concerning PPEA projects. Most of these controversies revolved around the friction between school boards, which are responsible for building new schools, and the local governing bodies, which approve the funding for school

construction. It was noted that more transparency from the start of PPEA projects is needed and especially at the local government level.

Part of the perception of secrecy stems from the lack of established criteria by which to distinguish truly confidential proprietary information from other types of information. Businesses all too often earmark all documents submitted to government as proprietary and thus thwart disclosure of records related to the procurement process. It was suggested that the term "confidential proprietary information" needs to be defined to protect that information which is truly confidential and is protected for all purposes and at all times (i.e., proprietary records that need to be protected notwithstanding the procurement process) versus that which the business would prefer not to have released, but which are related to the procurement transaction. It was suggested that the latter should become open when an agreement is entered into. Additionally, it was suggested that the exemption should specify the time when certain records of the transaction are to be made available. Answering the question what can be withheld *during* the process, it was suggested that when a public entity has all of the proposals, the deadlines for submission are over, and the public entity begins its review of the proposals, vendors have less need to be protected and therefore records of the proposals should be made publicly available. Further discussion, however, is needed on what should be open at the end of the process, but before the contract is awarded. From the private sector perspective, Mr. Axelle noted that there is some suspicion by the private sector that a public body has already made its decision before receiving all proposals. The losing contractors do not make a request for the records because they feel it is viewed as antagonistic by the public entity and the contractors want to maintain a good relationship with the public body for future procurement opportunities.

Under the PPEA, procurements records are required to be released once a comprehensive agreement has been entered into. This is consistent with the Virginia Public Procurement Act (VPPA) which provides public access to procurement records once a contract is awarded. Under the VPPA, bidders have an earlier right of inspection to ensure the fairness of the process. However, the PPEA does not contain a similar provision. Further, in 2005, the PPEA was amended to authorize the award of interim agreements. In light of this amendment, the subcommittee decided that this issue should be considered as part of its work. The subcommittee felt that if the agreement is binding on the parties, it should be available to the public. The nature of interim agreements was discussed. Many interim agreements are the staging agreements for the entire project and may include separate agreements for preliminary engineering studies, environmental work, design of the project, and finally, construction of the project. Interim agreements are used to avoid unnecessary delay on a project.

As a result of its discussions, the subcommittee by consensus agreed to examine the following issues:

- ❑ The need to define "confidential proprietary records."
- ❑ The need for an affirmative declaration and/or agreement by a public entity that certain records will be considered proprietary and thus protected from disclosure.

- ❑ The need to articulate specific time lines for release of records related to PPEA projects.
- ❑ Interim versus comprehensive agreements, and when records related to each should be made available.
- ❑ Disclosure of school construction proposals by school boards to the local governing bodies responsible for approving funding for school construction.

Concern was raised that with the expenditure of public dollars for PPEA projects, the public knows only at the end of the process how the money was spent. In question was whether it was the intent of the law to let the public know only after the agreement. Staff noted that in both the PPEA and the VPPA, the public right of inspection of procurement records occurs only after the contract has been awarded. Staff noted however that both laws require public notice at the beginning of the process of the nature of the work to be undertaken. A comparison of the disclosure requirements under the VPPA, PPEA, and PPTA are attached to this report as Appendix H.

The subcommittee stated that the balance necessary for development of good public policy is to facilitate competition while at the same time ensuring the public confidence in the decisions of government, especially when expending substantial public funds. The subcommittee agreed that it needed to hear from the private sector as it continues its deliberations. Staff will develop an issue matrix to array the issues outlined above to frame the issues and facilitate discussion. The subcommittee encourages any individual or group, state and local officials, and others interested in the work of the subcommittee to submit comment and participate in subcommittee meetings. A copy of the issue matrix is attached to this report as Appendix I.

Other Business

The Council at its last meeting had discussed whether a mandated fifth response to a FOIA request--the requested records do not exist-- was needed and directed staff to examine this issue more fully and present a proposal for the Council's consideration. The Council, in a written opinion (AO-16-04) has previously opined that a public body should make this written response where applicable in order to avoid confusion and frustration on the part of the requester. Staff advised that it was still working on draft language to present for the Council's consideration, but noted that the task was more difficult than first anticipated. Part of the difficulty was that the response "the records do not exist" may raise more questions than it answers and further contribute to feelings of distrust. Members of the Council stated that it seemed a matter of common courtesy for a public body to advise a requester when the requested records do not exist. Staff advised that it will continue to work on draft language and present it for the Council's consideration at the next meeting.

The Council next discussed the status of a guidance document for publication on the Council's website that clarifies a public body's obligations under FOIA in light of "value added" public records produced through the Virginia Information Technologies Agency (VITA) and subject to a licensing agreement with the requester. Staff advised that it has been working with VITA to develop a guidance document for publication on the Council's

website and that a draft of guidance document will be ready for the Council's review at the next meeting. The Council also requested that staff for the Joint Commission on Technology and Science be apprised on the Council's efforts in this regard.

Recent Virginia Supreme Court decision on FOIA

Staff advised the Council of the latest Virginia Supreme Court case involving FOIA in the case of *Cartwright v. Commonwealth Transportation Commissioner of Virginia*. The issue before the court was whether the circuit court (in Chesapeake) erred in denying a petition for a writ of mandamus¹⁷ brought in accordance with FOIA (§ 2.2-3713) on the ground that the petitioner had an adequate remedy at law. The facts that gave rise to the case involved a FOIA request made by a citizen for particular documents prepared by the Virginia Department of Transportation (VDOT). Specifically, Mr. Cartwright made a FOIA request to VDOT for a photocopy of a "sales brochure"¹⁸ compiled by VDOT relating to VDOT's highway construction project in Chesapeake. Mr. Cartwright is a property owner affected by the project and a party to the condemnation proceeding. Mr. Cartwright's FOIA request was denied and VDOT cited the "legal memorandum and other work product compiled specifically for use in litigation" (§ 2.2-3705.1 (3)) and "appraisal and cost estimates of real property subject to a proposed purchase, sale or lease, prior to the completion of such purchase, sale, or lease" (§ 2.2-3705.1 (8)). Mr. Cartwright had also sought the record through discovery served on VDOT.

Mr. Cartwright filed a FOIA petition for mandamus to compel production of the sales brochure. The trial court ruled in favor of VDOT and agreed that "the mandamus action was not appropriate because Mr. Cartwright could seek to obtain the same information through a motion to compel discovery in the pending condemnation action."¹⁹

The Supreme Court noted that this was the first time that it had considered whether a writ of mandamus filed as specifically authorized in FOIA may be denied because of the availability of another adequate remedy at law. **Note:** A writ of mandamus at common law is an extraordinary remedy which is "necessary to prevent the failure of justice."²⁰

The Court found:

1. The intent of General Assembly in enacting FOIA "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees..."²¹
2. FOIA "shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government;"²²

¹⁷ Writ of mandamus is used to compel a public official to perform a ministerial duty imposed on him by law.

¹⁸ According to the Court, "a sales brochure is a document prepared by VDOT for the purpose of preparing appraisals and offers for property that is subject to condemnation for public use."

¹⁹ *Cartwright v. Commonwealth Transportation Commissioner of Virginia*, 270 Va. 58; 613 S.E. 2d 449 (2005).

²⁰ Section 17.1-513 of the Code of Virginia.

²¹ Section 2.2-3700 of the Code of Virginia.

²² Section 2.2-3700 of the Code of Virginia.

3. Specific statutory authority exists for filing a mandamus action, with jurisdiction before the general district or circuit court, to enforce FOIA rights, with the action required to be heard within seven days of the petition;
4. The burden of proof on public body to establish an exemption by a preponderance of the evidence and any failure by a public body to follow FOIA procedures is presumed a violation; and
5. Specific enforcement provisions in FOIA are contrary to common law mandamus which puts burden of proof on the petitioner and contains presumption of government regularity.

The Supreme Court held that the circuit court erred in denying Mr. Cartwright's petition for mandamus. In its decision, the Court stated, "We hold that a citizen alleging a violation of the rights and privileges afforded by the FOIA and seeking relief by mandamus pursuant to Code § 2.2-3713 (A) is not required to prove a lack of adequate remedy at law, nor can the mandamus proceeding be barred on the ground that there may be some other remedy at law available."

Of Note

Staff reported that for the period March 23, 2005 through May 31, 2005, it had received a total of 347 inquiries. Of the 347 inquiries, seven had been requests for formal written opinions and 337 informal inquiries coming from telephone and emails. Citizens accounted for 143 of the informal inquiries, the government for 145 inquiries, and the media for 49 inquiries. Of the formal opinions, the breakdown was five requests by citizens and two by government.

Staff also reported that the Council-sponsored Symposium on Children's Records was scheduled for Tuesday, June 21, 2005 and that to date, there were approximately 40 people were registered, representing law-enforcement agencies, educational institutions, and social services agencies.

Planning has begun for the 2005 FOIA Workshops to be held in five statewide locations--Abingdon, Harrisonburg, Richmond, Norfolk, and Fairfax.

Public Comment

Bob Gibbons, a member of the Stafford County Board of Supervisors, discussed two issues with the Council. The first issue concerned the PPEA and mistrust of the process by the public. He advised that the PPEA works and that public bodies want to use it, but are electing to use traditional procurement processes to avoid exacerbating public mistrust. Additionally, Mr. Gibbons requested the Council to consider expanding the authority for electronic meetings to regional public bodies. He indicated that most members of regional public bodies must travel 75 to 100 miles for a one hour meeting. He suggested that authorization for audio/visual meetings only (and not teleconferences) should be explored for a selected regional public body as a way to provide more public access and to receive more public comment. He requested that the Council consider a one-year pilot project.

Lee Albright, a Nelson County citizen, advised the Council of his attempts to get records from the Department of Game and Inland Fisheries and of the need to file a lawsuit to gain access to the requested records. He discussed the favorable outcome of his FOIA suit against the Department for violation of FOIA. Mr. Albright indicated that he had received advisory opinions from the Council on this issue, but unfortunately, those opinions did not seem to influence the Department's actions. Mr. Albright expressed concern that a lawsuit was the only remedy under FOIA to force a public body to comply with the law. As a result of Mr. Albright's comments, the Council requested staff to prepare a report chronicling Mr. Albright's efforts to get records under FOIA and the disposition of his lawsuit. The members of the Council shared Mr. Albright's concern that citizens should not have to endure what Mr. Albright has, especially in light of the mandatory disclosure requirements of FOIA. The Council agreed to examine the issue of whether FOIA should be amended to provide additional remedies for violation.

August 31, 2005

The Council held its third quarterly meeting²³ of 2005. Among other things, the Council received progress reports from its two subcommittees, reviewed draft FOIA legislation and newly created educational material on FOIA charges, and received a demonstration by VDOT on its "FOIA Tracker" system.

Subcommittee Reports

1. The Electronic Meetings Subcommittee met on July 13, 2005 and reported that as part of its deliberations, it had discussed the legislative history of § 2.2-3708 (electronic meeting provisions) and noted that when the law was initially enacted in 1984, it prohibited any public body from conducting electronic meetings. The next significant amendment to this section came in 1992 when state public bodies were granted the permanent authority to conduct electronic meetings. In 1996, § 2.2-3708 was amended to require that a quorum of a state public body be assembled at one central location as a prerequisite for conducting electronic meetings. Finally, in 2005, this section was amended to significantly relax the procedural requirements for conducting electronic meetings by state public bodies. A copy of the legislative history of § 2.2-3708 is attached to this report as Appendix J. Chairman Edwards advised that the subcommittee voted not to recommend HB 2760 (Reese) as it related to local governing bodies and school boards in light of the significant relaxation of the procedural requirements made by the 2005 Session of the General Assembly to § 2.2-3708.

The subcommittee did, however, discuss the application of § 2.2-3708 to local regional public bodies. The subcommittee had previously been requested by the Potomac and Rappahannock Transportation Commission (the Commission) to authorize them to conduct a pilot project whereby the Commission could meet electronically and report its experiences. The Commission is comprised of public officials representing several

²³ All Council members were in attendance.

jurisdictions which required at least 90 minutes of travel one-way (assuming no traffic) to meetings in Manassas. The long commute to meetings also adversely impacts citizens wishing to attend. The representative of the Commission renewed the request for a pilot project by the Commission under specified conditions as deemed appropriate by the Council and the General Assembly to increase Commission member participation and that of the interested citizens. In response, the VPA and VCOG stated that, although they had not considered a pilot project specifically, a compelling need had not been demonstrated to further expand authorization for the conduct of electronic meetings. Noting further that because of the extensive rewrite of the electronic meetings law in 2005, the VPA and VCOG were opposed to further relaxation of the electronic meeting rules at this time.

A representative of the Piedmont Workforce Network (the Network) advised the subcommittee that the Network, required under the federal Workforce Investment Act, was comprised of a board of over 50 members, representing 11 jurisdictions. He advised that for some members, it is a two-hour commute one-way. He reported that due to the large number of members, the Network has trouble with attendance generally and also has trouble achieving a quorum for the conduct of its business. He noted that the ability to conduct electronic meetings would assist in the work of the Network.

A representative of the Virginia Association of Counties (VACO) advised the subcommittee that with shrinking budgets, VACO is encouraging regional cooperation. Authority for conducting electronic meetings would enhance regional cooperation and allow affected citizens to monitor the work of regional groups more easily.

Chairman Edwards stated that interest by local and regional public bodies in conducting meetings by electronic communication means would likely continue and at some future date, the Council would have to revisit the issue. He suggested, however, that for the present, the better course is to live with the 2005 changes to the law and monitor how it works.

Based on its discussion and the public comment received, the subcommittee voted unanimously to recommend to the Council that expanding the authority for the conduct of electronic meetings to regional public bodies was premature at this time in light of the significant relaxation of the procedural rules for electronic meetings made in 2005. Further, the subcommittee would recommend that the issue be revisited next year after some experience with the new rules as it was not insensitive to the needs of regional governments. The subcommittee recommended that in the spring of 2006 a subcommittee be appointed to review the issue of electronic meetings and regional public bodies. Mr. Edwards made a motion that the Council continue to monitor the use of electronic meeting by state public bodies and reconvene a subcommittee in spring 2006 to examine the issue of authorizing the conduct electronic meetings by regional public bodies. The motion was adopted unanimously.

2. Bill Axselle, chair of the PPEA Subcommittee, reported that PPEA Subcommittee met on August 26, 2005 to continue deliberating on issues about public access to procurement records under the PPEA/PPTA. Mr. Axselle noted that with the resignation

of Council and PPEA Subcommittee member David Hallock, the subcommittee had only two remaining members and requested the appointment of additional members to the subcommittee. Council members Houck and Wiley volunteered to serve on the PPEA Subcommittee. Mr. Axselle reported that the PPEA Subcommittee has held three meetings and was making progress, although it had no firm recommendations to make at this time. He reiterated the guiding principle of the subcommittee is to find the balance to facilitate competition while ensuring the public confidence in the procurement decisions of government, especially when expending substantial public funds. He identified several points of consensus reached, including (i) that trade secrets, financial statements of privately held companies, balance sheets, etc. should always be confidential; (ii) that conceptual proposals received by a public body should be posted on the websites of the respective public bodies; (iii) that FOIA should be amended to formalize the process for requesting and approval of confidential proprietary records in order for them to be protected; (iv) that a public comment period on proposals should be established that may include a public hearing in the discretion of the public body; and (v) that any recommendations of the subcommittee concerning disclosure of proposals should apply to both interim and comprehensive agreements under the PPEA. Mr. Axselle advised that staff will be preparing drafts on the points of consensus for review and comment at next meeting of the subcommittee.

Mr. Axselle identified the remaining issues to be considered by the subcommittee, including (i) the need to define confidential proprietary information; (ii) whether confidential proprietary information should be accessible to the public and if so, when; (iii) whether the VPPA, PPEA and PPTA (and not just FOIA) should be amended to require a more formalized request for protection of confidential proprietary information submitted by a business and a requirement for the public entity to formally declare what will be considered confidential proprietary information and therefore protected from disclosure.

Other Business

The Council reviewed draft legislation to require public bodies to advise a requester when a requested record does not exist. As drafted, the bill adds a fifth response to the list of responses a public body must make in response to a request for records under FOIA. Currently, the responses are (i) the records will be provided, (ii) the records will be entirely withheld, (iii) the records will be provided in part and withheld in part, and (iv) the public body needs more time to provide the records or to determine whether they exist. The fifth response required by the bill is for instances where the requested records cannot be provided because the public body is not the custodian of the requested records, the requested records do not exist, or such records cannot be found after diligent search. The public body is required to respond in writing and certify that (i) it is not the custodian of the records and is not in possession of the records, (ii) the requested records do not exist, or (iii) the requested records cannot be found after diligent search. The Council deferred action on the draft until its next meeting to allow more time for review and comment by Council members and other interested parties.

The Council next reviewed a proposed guidance document on allowable charges for record production under FOIA. Although public bodies have the authority to assess charges for the production of records under FOIA, there is still considerable misunderstanding among public bodies and citizens alike on this issue. This much-needed guidance document hopefully will clarify rights and responsibilities, which should lead to enhanced compliance with the FOIA charging provisions. The guidance document will be added to the Council's already broad array of educational materials and will be posted on its website.

Staff presented its report chronicling Mr. Lee Albright's efforts to obtain records from the Virginia Department of Game and Inland Fisheries (VDGIF) and, ultimately, Mr. Albright's FOIA suits against VDGIF. Staff advised that Mr. Albright's initial dispute with VDGIF concerned a request for salary records made in October, 2003. An advisory opinion regarding this dispute was issued in March, 2004. After several months of further correspondence between the parties, Mr. Albright sued VDGIF. An out-of-court settlement was reached resolving this dispute in August, 2004.

The second dispute concerned a request made in March, 2004, for meeting minutes of the Board of VDGIF. An advisory opinion regarding this second dispute was issued in December, 2004. This dispute was never resolved, but Mr. Albright let the matter drop after the resignation of the Chairman of the Board of VDGIF in March, 2005.

The third dispute arose after three records requests made in December, 2004, in which Mr. Albright asked for separate advance estimates. While Mr. Albright did receive the desired estimates, he only did so after filing suit, and this dispute was ultimately resolved by a court decision in Mr. Albright's favor in June, 2005.

The fourth dispute arose from a request initially made in October, 2004. While court decisions in Mr. Albright's favor regarding this fourth dispute were issued in June, 2005, and August, 2005, it appears that further litigation may be on-going at this time.

Additionally, it appears that the records generated from Mr. Albright's FOIA requests may have been used to support the State Internal Auditor's (SIA) investigation of VDGIF earlier this year. While the allegations in the SIA Report raise concerns in regard to FOIA as well as other areas, it appears that significant changes have occurred and continue to be made within VDGIF. Both the Chairman of the Board and the Director of VDGIF have resigned from their positions. The Chairman resigned in March, 2005; the Director resigned in May, 2005. VDGIF now has a new acting Director, Col. Gerald Massengill, formerly of the Virginia State Police.²⁴ At least one other Board member resigned in June, 2005. In addition, it appears that some of the higher-ranking employees named in the SIA Report have also resigned, and news reports have described other organizational changes within VDGIF. News reports have also indicated that a criminal investigation by the Virginia State Police is ongoing into the matters described in the SIA Report.

²⁴ Mr. Albright has indicated that Col. Massengill has been very supportive and helpful regarding Mr. Albright's FOIA issues with VDGIF, describing his current interaction with Col. Massengill as a "180 degree turnaround" from the adversarial encounters he had with former VDGIF staff and officials.

It appears that dozens of articles, editorials, and commentaries have been published about Mr. Albright's encounters with VDGIF and the SIA Report in various media. The three articles included herein are representative of the reporting on Mr. Albright's experiences in seeking documents from VDGIF through FOIA, and on current events at VDGIF that have resulted from the SIA Report.²⁵

The members of the Council shared Mr. Albright's concern that citizens should not be subjected to what Mr. Albright has experienced, especially in light of the mandatory disclosure requirements of FOIA. The Council queried whether Mr. Albright's experience was typical. Mr. Albright indicated that he believed the experience to be an aberration based on the fact that he has made numerous FOIA requests to other units of government who fully complied with the law in providing documents. The Council agreed that at its next meeting it would examine whether changes in the remedies afforded by FOIA should be made.

The Council discussed the need to begin planning for "Sunshine Week" in March 2006. The Council expressed an interest in taking an active part in "Sunshine Week" in 2006 and will begin consideration of the method and nature of its involvement. Ginger Stanley of the VPA offered to work with Council staff to develop recommendations for the Council's participation in Sunshine Week.

Senator Houck brought to the Council's attention an editorial from the Staunton News Leader dated August 28, 2005 on the Virginia Information Technologies Agency (VITA) and the perceived secrecy with which VITA is overhauling the IT systems of state government. Senator Houck stated that, to his understanding, VITA is not operating outside of the law, but its actions raise significant policy issues regarding public procurement. Senator Houck requested staff to invite VITA to the next Council meeting to discuss their actions in this matter and explain the need for such secrecy.

Of Note

Frankie R. Giles, Assistant Policy Director, VDOT, demonstrated the VDOT "FOIA Tracker" system. She indicated that VDOT handles between 350 and 400 FOIA requests per year. She explained that with 9,300 VDOT employees and nine districts offices throughout Virginia, VDOT, on its own initiative, developed a centralized system to track and respond to FOIA requests. Benefits already derived from this new system include greater accountability, consistency, and compliance with FOIA; better response for the citizens requesting VDOT records; and real time data analysis for VDOT managers. She reported that development of the "FOIA Tracker" system cost approximately \$100,000 and involved four VDOT employees who spent two months to develop the system. The Council commended VDOT for its initiative in the development of the "FOIA Tracker" system and its willingness to investigate ways in which to share its approach with other agencies. In addition, VDOT was commended for building an institutional culture that sends a positive message to its employees about the importance of FOIA.

²⁵ Excerpted from a memorandum dated August 31, 2005 from Alan Gernhardt, Council staff attorney, to the members of the Council.

Staff reported that for the period June 1, 2005 through August 31, 2005, it had received a total of 424 inquiries. Of the 424 inquiries, five had been requests for formal written opinions and 419 informal inquiries coming from telephone and emails. Citizens accounted for 164 of the informal inquiries, the government for 204 inquiries, and the media for 51 inquiries. Of the formal opinions, the breakdown was three requests by citizens and two by government.

Staff also reported that preparations for the 2005 FOIA Workshops in October in Abingdon, Harrisonburg, Richmond, Norfolk, and Fairfax were nearing completion.

Public Comment

Frosty Landon of the VCOG stated that although Mr. Albright's experience with VGIF was an aberration, it was not unique. Mr. Landon indicated that it is significant that Mr. Albright went to the Council first for assistance and not to courts. He noted that when the Council was created in 2000, Delegate Woodrum stated on the House floor that the Council would provide informal mediation, although that is not specified in the Council's enabling statute. Mr. Landon opined that without favorable advisory opinions from the Council, Mr. Albright would not have pursued his FOIA remedies through the court system. Mr. Landon suggested that the Council consider recommending specific statutory authority for informal mediation to resolve FOIA disputes.

November 17, 2005

The Council²⁶ conducted its customary annual legislative preview as its fourth meeting of 2005. In addition to the legislative preview, the Council received a progress report from its PPEA/PPTA²⁷ Subcommittee, reviewed possible Council legislative proposals, and received a briefing from the Virginia Information Technologies Agency (VITA) on its proposal for outsourcing the state's information technology. The Council also welcomed its newest member, Mary Yancey Spencer of the Virginia State Bar, who replaced David Hallock as one of the citizen members of the Council.

Subcommittee Report

The PPEA/PPTA Subcommittee reported that it had met four times to develop a consensus draft relating to public access to procurement records under both the PPEA and the PPTA. While there are many points of consensus, several issues remain unresolved, including alternatives to posting certain records on websites, the protection of other records submitted by a private entity that are not trade secrets or private financial information, and whether there should be access to any procurement records (other than the proposed interim

²⁶ Council members in attendance were Senator Houck, Delegate Griffith, J. Stewart Bryan, John Edwards, Craig T. Fifer, W. Wat Hopkins, Mary Yancey Spencer, Roger C. Wiley, and Nolan Yelich. Council members Ralph L. Bill Axelle, E.M. Miller, and Thomas Moncure were absent.

²⁷ The Public-Private Education Facilities and Infrastructure Act of 2002/Public-Private Transportation Act of 1995.

or comprehensive agreement) before execution of an agreement, and if so, by whom (participating proposers and/or the public).

Because of the remaining unresolved issues, a motion was adopted by the Council to refer the matter back to the subcommittee for further deliberations. It is anticipated that the subcommittee will conclude its work and make its recommendations to the Council for its consideration at its next meeting on December 29, 2005.

Legislative Proposal

The Council again reviewed its proposed draft legislation relating to a mandated fifth response to FOIA requests--"the requested records do not exist." Consideration of this draft was deferred from the last Council meeting to allow Council members and the public time to review the draft and make comment. Alternative language was proposed by Council member Craig Fifer to eliminate the use the term "custodian" as it was not defined in FOIA. Additionally, Mr. Fifer proposed changes to the staff draft which would (i) require all public bodies, even ones not subject to FOIA, to make a response to a FOIA request by stating that they are exempt from the provisions of FOIA; (ii) add an affirmative requirement that if a public body does not have the requested records but is aware which public body does, the requestor must be made aware of that fact; and (iii) provide a new basis--the request would require an extraordinarily lengthy search-- for a public body to petition the court for more time to respond to request.

Some Council members expressed concern that placing an affirmative duty on a public body that does not have the requested records to tell a requester where the records can be obtained sets up a situation that cannot be proven and may foster FOIA battles over that issue. The response that "the records do not exist" was also source of concern given the difficulty in proving a negative as well as what happens if it was later proved that the records did exist. The Council favored the approach that the records could not be found after a diligent search. It was the consensus of the Council that a fifth response should be included as one of the mandatory responses to a FOIA request and directed staff to continue to work on draft language in light of the comments made. Final deliberations on the draft will be the subject of the next meeting of the Council on December 29, 2005.

Legislative Preview

1. Dr. Daniel J. LaVista, Executive Director, State Council of Higher Education for Virginia (SCHEV) and Alan L. Wurtzel, Chair of SCHEV, advised the Council that SCHEV sought an exemption from the electronic communication meeting requirements in FOIA found at § 2.2-3708. They indicated that it was not their intent to undermine FOIA, but that travel issues make physically assembled meetings counter productive. Additionally, there are increased workloads on SCHEV as a result of the restructuring of public institutions of higher education. Under their proposed amendment, the provisions of § 2.2-3708 would not apply to SCHEV, although three members of SCHEV would have to be physically located at one location with public access via telephone access code and/or at a conference facility with at least 25 available telephone lines. Additionally, no votes or

actions could be taken by SCHEV for meetings conducted in this manner. While acknowledging SCHEV's proposed amendment has little chance of success, Council member Roger Wiley commented that SCHEV's position is not unlike that of local and regional public bodies in terms of travel issues and the burdens current electronic communication meeting requirements place on public officials. Further, he noted that technology has made physically assembled meetings unnecessary. Council member Stewart Bryan indicated that although he understood that travel for public business can be burdensome, he noted that there are other issues to be consider other than the convenience of the members of a public body. He suggested that a subcommittee be created to consider the issues raised by SCHEV and Mr. Wiley. Public comment on the SCHEV proposal was that the new, relaxed rules for electronic communication meetings only became effective in July 2005 and four months was not enough time on which to base yet another statutory change.

Recognizing that the issues attendant to electronic communication meetings deserved further study, the Council, by consensus, agreed to reconstitute its subcommittee on electronic communication meetings. Council members John Edwards, Roger Wiley, E.M. Miller, Stewart Bryan, and Senator Houck were appointed to the subcommittee. Additionally, Senator Houck invited Mr. Wurtzel to participate in the work of the subcommittee when it begins its deliberations in the spring of 2006.

2. Patrick C. Devine, Jr., Esquire, Williams Mullen Hofheimer Nusbaum, advised the Council that he spoke on behalf of the Virginia Bar Association's Health Laws Section concerning the need for a general clean-up of various laws relating to hospital authorities, including amendments to FOIA. He indicated that there was too much variety in the law concerning the treatment of hospital authorities, with some being covered by the Hospital Authority law (§ 15.2-5300 et seq.) while others are covered by special acts of the General Assembly. He stated that the FOIA provisions relating to the Medical College of Virginia and the University of Virginia Medical Center were left untouched by his proposal; although he believed that hospital authorities should have the same FOIA exemptions that MCV and UVA enjoy. He advised the Council that the proposal was still a work in progress and did not represent a final draft. The Council suggested that Mr. Devine include the VPA and the VCOG as part of the Virginia Bar Association's Health Laws Section's consideration of the issues.

Other Business

1. Lemuel C. Stewart, Jr., Chief Information Officer, VITA, briefed the Council on VITA's efforts to procure goods and services for Virginia's information technology needs using the PPEA. Mr. Stewart began his remarks by stating that the Information Technology Investment Board (the Board) fully supports FOIA but believes there should be a balance between facilitating competition and public access to competitive processes. The Board voted unanimously on October 25, 2005 to select Northrop Grumman for a potential 10-year partnership agreement valued at \$1.986 billion to modernize the Commonwealth's information technology (IT) infrastructure and services. He told the Council that the agreement is on VITA's website. He said that VITA chose to make it an interim agreement

so that it could be reviewed by the public and the General Assembly. He stated that he does not believe an agreement should be posted before it is entered into because nothing is final until the agreement is signed by the parties. Additionally, he noted that there is a standard clause in each agreement that states that the agreement is void at the option of the Commonwealth at anytime, which he believes is there to protect the public interest. Mr. Stewart told the Council that the PPEA is best suited for big projects. He agreed that use of the PPEA is more expensive, but claimed that the outcome is superior. He stated that private innovation is the benefit derived from this method of procurement. Mr. Stewart reported that the state's IT procurement process under the PPEA was a two-year process that began in December 2003 with the receipt by VITA of four unsolicited proposals. By June 2004, all proposals were posted on VITA's website. He indicated that the documents were open for public review for a full year and were the subject of 9,000 independent reviews. VITA followed the Department of General Services Capitol Outlay Manual and the Secretary of Administration's requirements. In addition, VITA fielded questions from the public and state employees. He claimed that newspaper accounts of these negotiations implied that VITA was secretive. Mr. Stewart stated that while negotiations among the vendors were underway, documents related to the negotiations were not released to protect the competitive and financial interests of the Commonwealth. Queried if given the chance to do it over again would VITA change anything, Mr. Stewart indicated that it is important at the beginning to set out the PPEA process and the timetable for release of records.

2. On the issue of the adequacy of FOIA remedies in light of Lee Albright versus Virginia Department of Game and Inland Fisheries (VDGIF), held over from the last meeting, the Council, by consensus, agreed the remedies authorized under FOIA were sufficient and no further action was needed.

3. Staff reported that since the relaxation of the rules governing electronic communication meetings in July 2005, two reports covering two electronic communication meetings were filed by the Executive Committee of the Virginia Workforce Council.

4. The Council briefly discussed plans for participation in Sunshine Week in March 2006. The Council directed staff to work with the Virginia Press Association, the Virginia Association of Broadcasters, and the Virginia Coalition for Open Government to coordinate efforts to publicize Sunshine Week.

Of Note

1. The Council was briefed by Lisa Wallmeyer, staff to the Joint Subcommittee Studying the Public Records Act pursuant to HJR 6 (2004), on the status of that joint subcommittee's work to date.

2. Staff briefed the Council on the latest statistics on opinions rendered by the Council for the period September 1 through November 15, 2005. There were 306 requests for informal opinions (phone, email, etc.) as follows: 144 from citizens, 130 from state and local government, and 32 from media representatives. No formal written opinions were issued in this period.

3. Staff updated the Council on the outcome of the annual FOIA workshops, held in Abingdon, Harrisonburg, Fairfax, Richmond and Norfolk in October. The workshops were approved by the Virginia State Bar for continuing legal education credit, the Department of Criminal Justice Services for law-enforcement credit, and the Virginia School Board Association for academy points, and reached approximately 350 persons statewide, including government officials, media representatives and citizens. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the last two years as a sign that its basic training mission had been successfully accomplished. The Council welcomed the opportunity to provide other relevant training programs to meet the needs of government officials, the media, and citizens alike. Statewide workshops will continue to be offered in odd-numbered years to provide training to new public officials and employees. In even-numbered years, the Council will conduct workshops to address topic-specific issues such as public access in light of HIPPA, the Patriot Act, and other federal and state laws.

SERVICES RENDERED BY THE COUNCIL

As part of its statutory duties, the Council is charged with providing opinions about the application and interpretation of FOIA, conducting FOIA training seminars, and publishing educational materials. In addition, the Council maintains a website designed to provide on-line access to many of the Council's resources. 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 statewide FOIA Workshops, Council staff is available to conduct FOIA training throughout Virginia, upon request, to governmental entities, media groups and others interested in receiving a FOIA program that is tailored to meet the needs of the requesting organization. This service is provided free of charge. The Council develops and continually updates free educational materials to aid in the understanding and application of FOIA. In addition to keeping educational materials up-to-date, the Council developed two new guides to ensure compliance with the provisions of FOIA relating to allowable charges for record production and a primer on conducting electronic meetings. During this reporting period, the Council, with its staff of two, responded to more than 1,600 inquiries and conducted 47 training seminars statewide. A listing of these training seminars appears as Appendix B.

FOIA Opinions

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all 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, citizens, or out-of-state callers.

The logs help to 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. All opinions, whether written or verbal, are based on the facts and information provided to the Council by the person requesting the opinion.

For the period of December 2004 to December 2005, the Council, with a staff of two attorneys, fielded more than 1,600 inquiries. Of these inquiries, 16 resulted in formal, written opinions. By issuing written opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide future practices. In addition to sending a signed copy of the letter opinion to the requester, written opinions are posted on the Council's website in chronological order and in a searchable database. The Council issues written opinions upon request, and requires that all facts and questions be put in writing by the requester. Requests for written opinions are handled on a "first come, first served" basis. Response for a written opinion is generally about 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 formal opinions issued during the past year appears as Appendix C. The table below profiles who requested written advisory opinions for the period December 2004 through December 2005:

Written Advisory Opinions:

| | |
|------------------------------|----|
| State Government | 1 |
| Local Government | 0 |
| Law Enforcement | 3 |
| Citizens of the Commonwealth | 11 |
| Members of the News Media | 1 |
| Out-of-state | 0 |

Typically, the Council provides advice over the phone and 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 as are 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. The table below profiles who requested informal opinions between December 2004 and December 2005:

Telephone and E-mail Responses: 1,652

| | |
|------------------------------|-----|
| State Government | 360 |
| Local Government | 325 |
| Federal Government | 2 |
| Law Enforcement | 69 |
| Citizens of the Commonwealth | 627 |
| Members of the News Media | 209 |
| Out-of-state | 60 |

During this reporting period, the Council has answered a broad spectrum of questions about FOIA. Appendix F to this report provides a breakdown of the type and number of issues raised by the inquiries received by the Council.

The Council's Website

The website address for the Council is <http://dls.state.va.us/foiacouncil.htm>. During the past year, the website was visited over 65,000 times. About 39,000 visitors viewed the written advisory opinions of the Council. The Council's website provides access to a wide range of information concerning FOIA and the work of the Council, including (i) Council meeting schedules, including meeting summaries and agendas, (ii) the membership and staff lists of the Council, (iii) reference materials and sample forms and letters, (iv) the Council's annual reports, (v) information about Council subcommittees and legislative proposals, and (vi) links to other Virginia resources, including the Virginia Public Records Act. To facilitate compliance with FOIA, sample response letters for each of the four mandated responses to a FOIA request as well as a sample request letter are available on the website. Written advisory opinions have been available on the 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 Training

For the sixth year, Council staff conducted statewide FOIA training workshops. This year, workshops were conducted during the second and third weeks of October in Abingdon, Harrisonburg, Fairfax, Richmond and Norfolk. Each workshop contained a segment focusing on access to records, access to meetings, 2005 legislative update, allowable charges under FOIA, and access to criminal and law-enforcement records. Participants were provided with copies of the law and other educational materials designed to answer questions about FOIA and facilitate compliance with the law. The workshops were approved by the State Bar of Virginia for 4.5 hours of continuing legal education credit (CLE) for attorneys. They were also approved for in-service credit for law-enforcement personnel by the Department of Criminal Justice Services and for three academy points for school board officials by the Virginia School Board Association. Approximately 350 people attended the workshops around the state. Attendees included state and local government employees and officials, law-enforcement personnel, and members of the public and the news media. Course evaluation forms turned in by the participants indicated that the workshops were well received. In addition to the Council, the workshops were sponsored by 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 Board Association. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the last two years as a sign that its basic training mission had been successfully accomplished. The Council welcomed the opportunity to provide other relevant training programs to meet the needs of government officials, the media, and citizens alike. Statewide workshops will

continue to be offered in odd-numbered years to provide training to new public officials and employees. In even-numbered years, the Council will conduct workshops to address topic-specific issues such as public access in light of the HIPPA, the Patriot Act, and other federal and state laws.

In addition to the FOIA workshops, the Council also provides training, upon request, to interested groups. These groups include the staff of state agencies, members of local governing bodies, media organizations, and any other group that wishes to learn more about FOIA. Council staff travels extensively throughout the Commonwealth to provide this training. The training is individualized to meet the needs of the particular group, can range from 45 minutes to several hours, and can present a general overview of FOIA or focus specifically on particular exemptions or portions of FOIA frequently used by that group. These specialized programs provided free of charge. This year, the Council is pleased to announce that all of its training programs, whether the annual workshops or specialized programs, have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys. From December 2004 to December 2005, the Council conducted 47 such training programs. A listing of the training seminars appears as Appendix B.

Educational Materials

The Council continuously creates and updates educational materials that are relevant to requesters and helpful to government officials and employees in responding to requests and conducting public meetings. Publications range from documents explaining the basic procedural requirements of FOIA to documents exploring less-settled areas of the law. These materials are available on the website and are frequently distributed at the training seminars described above. Specifically, the Council offers the following educational materials:

- Access to Public Records
- Access to Public Meetings
- How to Make a Closed Meeting Motion
- Law Enforcement Guide to FOIA
- Guide to Electronic Meetings
- E-Mail: Use, Access & Retention
- E-Mail & Meetings
- Taking the Shock Out of FOIA Charges
- 2005 FOIA & Access Bill Summaries

In addition to these educational materials, the Council has also developed a series of sample letters to provide examples of how to make and respond to FOIA requests. A sample request letter is also available for a person wishing to make a FOIA request. Response letters are provided to demonstrate how to follow the legal requirements to withhold records in part or in their entirety, or to notify a requester of the public body's need for a seven-day extension to respond to the request.

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 sixth 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 more than 1,600 inquiries. It formed subcommittees 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, Chair
H. Morgan Griffith
Ralph L. "Bill" Axselle
John Stewart Bryan, III
John B. Edwards
Craig T. Fifer
W. Wat Hopkins
E. M. Miller, Jr.
Thomas M. Moncure, Jr.
Mary Yancey Spencer
Roger C. Wiley
Nolan T. Yelich

2006 LEGISLATIVE RECOMMENDATIONS

As of the publication of this report, the Council had not formally acted on the two legislative proposals under consideration. The Council will meet on December 29, 2005 to take final action on the legislative proposals. What follows is a summary of the legislative proposals currently under consideration by the Council.

1. Mandated Fifth Response to a FOIA Request.

Freedom of Information Act (FOIA); responding to requests for records. Adds a fifth response to the list of responses a public body must make in response to a request for records under FOIA. Currently, the responses are (i) the records will be provided, (ii) the records will be entirely withheld, (iii) the records will be provided in part and withheld in part, and (iv) the public body needs more time to provide the records or to determine whether they exist. The fifth response required by the bill is for instances where the requested records cannot be provided because the public body is not the custodian of the requested records, the requested records do not exist, or such records cannot be found after diligent search. The public body shall respond in writing and certify that (i) it is not the custodian of the records and is not in possession of the records, (ii) the requested records do not exist, or (iii) the requested records cannot be found after diligent search. The bill is a recommendation of the Virginia Freedom of Information Advisory Council.

2. Public Access to Procurement Records under the PPEA/PPTA.

Freedom of Information Act (FOIA); disclosure of procurement records under the Public-Private Transportation Act of 1995 (PPTA) and the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA). Revises the current FOIA exemption for records submitted by a private entity to a responsible public entity under the PPTA and the PPEA and formalizes the earmarking process or the protection of trade secrets, financial records, and other records submitted by a private entity, by requiring a written request for an exclusion from disclosure by the private entity and for a written determination by the responsible public entity that such records will be protected from disclosure under certain circumstances. The bill also amends the PPTA and PPEA to require a public entity to post all accepted conceptual proposals, whether solicited or not. The required posting for responsible public entities that are state agencies, departments, and institutions, shall be on eVA (the Department of General Service's web-based electronic procurement program) and for responsible public entities that are local public bodies, posting shall be on the responsible public entity's website or by publication, in a newspaper of general circulation in the area in which the contract is to be performed, of a summary of the proposals and the location where

copies of the proposals are available for public inspection. Local public bodies may also post on eVA, in the discretion of the local responsible public entity. The bill also requires at least one copy of the proposals shall be made available for public inspection. The bill provides that nothing shall be construed to prohibit the posting of the conceptual proposals by additional means deemed appropriate by the responsible public entity so as to provide maximum notice to the public of the opportunity to inspect the proposals. The bill also requires the responsible public entity to provide an opportunity for public comment 30 days before the execution of an interim or comprehensive agreement. The bill provides that once the process of bargaining of all phases or aspects of an interim or comprehensive agreement is complete, but before an interim or a comprehensive agreement is entered into, a responsible public entity shall post the proposed agreement. Once an interim or comprehensive agreement has been executed, all procurement records, excluding trade secrets, financial information, and cost estimates, are available to the public upon request. The bill is a recommendation of the Freedom of Information Advisory Council.

APPENDIX B

TRAINING/EDUCATIONAL PRESENTATIONS

An important aspect of the Council's work involves efforts to educate citizens, government officials, and media representatives by means of seminars, workshops, and various other public presentations.

From December 1, 2004 through December 1, 2005, Council staff conducted 47 training seminars, which are listed below in chronological order identifying the group/agency requesting the training.

| | |
|-------------------|---|
| December 9, 2004 | Compensation Board, New Constitutional Officers Training Richmond, Virginia |
| December 10, 2004 | Electric Utility Restructuring Consumer Advisory Board Richmond, Virginia |
| December 10, 2004 | Indigent Defense Commission Richmond, Virginia |
| January 3, 2005 | Virginia General Assembly, New Member Training Richmond, Virginia |
| March 8, 2005 | Human Resource Managers and Staff Department of Mental Health, Mental Retardation, and Substance Abuse Services Staunton, Virginia |
| March 15, 2005 | City of Williamsburg Williamsburg, Virginia |
| March 16, 2005 | Spotsylvania County Sheriff's Office Spotsylvania County, Virginia |
| March 22, 2005 | Alzheimer's Disease and Related Disorders Commission Department for the Aging Richmond, Virginia |
| March 30, 2005 | Public Guardianship/Conservator Advisory Board Department for the Aging Richmond, Virginia |
| April 11, 2005 | Fluvanna League of Women Voters Fluvanna County, Virginia |

| | |
|-----------------|---|
| April 13, 2005 | City Clerk's Office, City of Manassas Manassas, Virginia |
| April 20, 2005 | Commonwealth Management Institute Williamsburg, Virginia |
| April 25, 2005 | Hampton Roads Sanitation District Commission Virginia Beach, Virginia |
| May 10, 2005 | Compensation Board, New Deputy and Office Administrator Training Richmond, Virginia |
| May 18, 2005 | Commonwealth Management Institute Hampton, Virginia |
| May 13-14, 2005 | Annual Conference National Freedom of Information Coalition Santa Fe, New Mexico |
| May 18, 2005 | Commonwealth Management Institute Hampton, Virginia |
| May 19, 2005 | Compensation Board, New Deputy and Office Administrator Training Roanoke, Virginia |
| May 19, 2005 | Botetourt County Botetourt County, Virginia |
| May 20, 2005 | Virginia Department of Veterans Services Roanoke, Virginia |
| May 23, 2005 | Department of Education Richmond, Virginia |
| May 26, 2005 | Associated Press Richmond, Virginia |
| June 6, 2005 | Indigent Defense Commission Richmond, Virginia |
| June 8, 2005 | Sorensen Institute for Political Leadership Richmond, Virginia |

| | |
|---------------------|--|
| June 9, 2005 | James City County James City County, Virginia |
| June 13, 2005 | Office of the Governor Richmond, Virginia |
| June 14, 2005 | Departments of Rehabilitative Services, Blind and Visually Impaired, and Deaf and Hard of Hearing Richmond, Virginia |
| June 20, 2005 | Virginia Building Code Academy Department of Housing and Community Development Harrisonburg, Virginia |
| June 21, 2005 | Symposium on Children's Records Richmond, Virginia |
| July 19, 2005 | Planning Commission, City of Suffolk Suffolk, Virginia |
| July 25, 2005 | Department of Medical Assistance Services Richmond, Virginia |
| August 23, 2005 | Franklin County Franklin County, Virginia |
| September 20, 2005 | Department of Planning and Budget Richmond, Virginia |
| September 28, 2005 | Commonwealth Management Institute Williamsburg, Virginia |
| October 6, 2005 | Department of Juvenile Justice Richmond, Virginia |
| October 11-20, 2005 | 2005 FOIA Workshops Abingdon, Harrisonburg, Fairfax, Richmond and Norfolk, Virginia |
| October 13, 2005 | American Society of Access Professionals, Inc. Washington, D. C. |
| October 24, 2005 | Media Ethics Class, Virginia Commonwealth University Richmond, Virginia |

| | |
|-------------------|---|
| October 25, 2005 | Indigent Defense Commission Richmond, Virginia |
| October 26, 2005 | Commonwealth Management Institute Charlottesville, Virginia |
| October 27, 2005 | Annual Human Resource Conference Department of Human Resource Management Virginia Beach, Virginia |
| November 4, 2005 | Fauquier County Bar Association Fauquier County, Virginia |
| November 16, 2005 | Ninety Plus Nine Breakfast Club Richmond, Virginia |
| November 16, 2005 | Appomattox River Water Authority and the South Central Wastewater Authority Petersburg, Virginia |
| November 16, 2005 | New Sheriffs Training Virginia Sheriffs' Association |
| November 18, 2005 | Virginia Coalition for Open Government Access 2005 Lexington, Virginia |
| November 30, 2005 | Town of Purcellville and surrounding localities Purcellville, Virginia |

APPENDIX C

INDEX OF WRITTEN ADVISORY OPINIONS December 1, 2004 through December 1, 2005

Opinion No.

Issue(s)

December 2004

- AO-24-04 A motion to convene a closed meeting must identify the subject and purpose of the meeting, and cite to a specific statutory exemption. Decisions reached in closed session do not become effective until voted upon in an open meeting.
- AO-25-04 Open meeting minutes must be made available to any citizen of the Commonwealth upon request during the regular office hours of the custodian. Information that must be included in meeting minutes of a public body is set forth in FOIA. The intent of FOIA is best achieved by clear communication between the requester and the public body.
- AO-26-04 The Virginia Board of Bar Examiners has statutory discretion to decide whether or not to release bar examination scores, regardless of whether the scores in question are those of particular individuals or those of aggregate groups.
- AO-27-04 A task force of citizens organized by a mayor-elect is not a "public body" subject to the open records and meetings requirements of FOIA.
- AO-28-04 A private entity that exercises no governmental authority and is not wholly or principally supported by government funds is not a public body subject to FOIA's records and meeting requirements. Money received by a private entity from government sources under a procurement contract should not be used to determine whether an entity is wholly or principally supported by public funds.

2005 (through December 1, 2005)

- AO-01-05 No agreement reached in a closed meeting becomes effective until the public body takes an affirmative vote in an open meeting. FOIA requires the motion for that vote have its

substance reasonably identified in the open meeting. For the purposes of the motion, substance is defined as a fundamental part, quality or aspect; the essential quality or import of a thing.

AO-02-05

NOTICE: This opinion has been rescinded. Please see Advisory Opinion 07 (June, 2005).

AO-03-05

Letters of reference and recommendations are generally treated as personnel records under FOIA. Like other personnel records, they may be withheld from third parties but must be disclosed to their subject upon request. However, educational agencies and institutions may withhold these records, even from their subject, pursuant to subdivision 2 of § 2.2-3705.4.

AO-04-05

Records concerning what websites and keywords are blocked by a computer network firewall may be withheld from public disclosure as such records describe the design and function of a security system (pursuant to subdivision 3 of § 2.2-3705.2).

AO-05-05

FOIA does not require a public body to inform a requester when a requested record does not exist. However, public officials would be well advised to clearly state when requested records do not exist in order to avoid confusion and frustration on the part of the requester. FOIA does not contain any specific provisions concerning the legibility of public records. However, as a practical matter, copies of records produced in response to a request should be legible, so long as the original records are legible. Public bodies and requesters may enter mutually satisfactory agreements to resolve any problems with regard to the production of records.

AO-06-05

FOIA does not require a public body to create a new record to satisfy a request. If a public body elects to abstract or summarize records, it can only charge for such a newly-created record pursuant to a prior agreement with the requester. A public body must provide a requester with an estimate of all charges in advance of providing copies if the requester asks for one. The purposes of FOIA are best served by clear and open communication between requesters and public bodies.

- AO-07-05 This opinion rescinds Advisory Opinion 02 (March, 2005). The identities of victims need not but may be released pursuant to subsection D of § 2.2-3706. The release of such information is discretionary except where disclosure is prohibited or restricted under § 19.2-11.2. Furthermore, FOIA establishes a conflict resolution rule in subsection H of § 2.2-3706, which provides that in the event of conflict between § 2.2-3706 as it relates to requests made under § 2.2-3706 and other provisions of law, § 2.2-3706 shall control.
- AO-08-05 Under FOIA, motor vehicle accident reports concerning juveniles should be treated the same as those concerning adults, except as provided in § 2.2-3706(C).
- AO-09-05 Two members of a public body who also serve as members of the board of a private entity do not transform that private entity into a public body subject to FOIA. Whether an entity is a public body subject to FOIA because it is supported principally by public funds must be determined on a case-by-case basis.
- AO-10-05 A "special study group" composed of citizen members appointed by a county board of supervisors to make recommendations to the Board and the county's Planning Commission is a public body subject to FOIA. Public bodies may adopt rules governing the placement and use of recording equipment during a meeting. However, a public body may not prohibit a recording from being made.
- AO-11-05 The definition of a public body includes committees, subcommittees and other entities of public bodies that advise or perform delegated functions of the larger public body. Meetings of such committees are subject to the open meeting requirements of FOIA. A gathering of three members of a public body, or a quorum if less than three, to discuss the public business of that body, is a meeting subject to FOIA.

APPENDIX D

2005 Meetings of the Freedom of Information Advisory Council

Wednesday, March 23, 2005, 2:00 p.m.

House Room D, General Assembly Building, Richmond

Recap of FOIA and Related Access Bills from 2005 Session of General Assembly. Review of legislation referred to FOIA Council for study; creation of subcommittees to study referred bills: HB 2672 (Plum) Public-Private Education Facilities and Infrastructure Act (PPEA) records and HB 2760 (Reese), electronic meetings by local public bodies. Discuss appropriateness of adding a fifth response--the requested records do not exist. Report on Sunshine Week-- Joe Budd, Virginia Association of Broadcasters; Ginger Stanley, Virginia Press Association; Frosty Landon, Virginia Coalition for Open Government. Update on number of inquiries to Council for advisory opinions (oral and written). Planning for Symposium on Children's Records. Plans for 2005 annual statewide FOIA workshops.

Wednesday, June 15, 2005, 1:00 p.m.

House Room D, General Assembly Building, Richmond

Progress reports from PPEA Subcommittee and Electronic Meeting Subcommittee. Discussion of appropriateness of adding a fifth response--the requested records do not exist. Update on number of inquiries to Council for advisory opinions (oral and written). Update on plans for 2005 annual statewide FOIA workshops. Update on plans for Symposium on Children's Records scheduled for June 21, 2005.

Wednesday, August 31, 2005, 1:00 p.m.

House Room D, General Assembly Building, Richmond

Progress reports from PPEA Subcommittee and Electronic Meeting Subcommittee. Review of (i) legislative draft adding a fifth response--the requested records do not exist and (ii) guidance document on FOIA charges. FOIA Case Study: Lee Albright versus Virginia Department of Game and Inland Fisheries. Planning for "Sunshine Week" in March 2006. Demonstration: VDOT "FOIA Tracker," Frankie R. Giles, Assistant Director for Policy, VDOT. Update on number of inquiries to Council for advisory opinions (oral and written). Update on plans for 2005 annual statewide FOIA workshops.

Thursday, November 17, 2005, 9:00 a.m.

House Room D, General Assembly Building, Richmond

Progress report from PPEA Subcommittee. Review of legislative draft adding a fifth response--the requested records do not exist. Annual legislative preview: (1) Dr. Daniel J. LaVista, Executive Director, State Council of Higher Education for Virginia (SCHEV) and Alan L. Wurtzel, Chair of SCHEV; electronic meeting exemption for SCHEV and (2) Patrick C. Devine, Jr., Esquire, Williams Mullen Hofheimer Nusbaum, general FOIA clean up concerning hospital authorities' exemptions. Report on Virginia Information Technologies Agency (VITA) efforts to procure goods and services for Virginia's information technology needs under the Public-Private Education Facilities and Infrastructure Act of 2002, Lemuel C. Stewart, Jr., Chief Information Officer, VITA.

Update on number of inquiries to Council for advisory opinions (oral and written). Recap of 2005 annual statewide FOIA workshops. Planning for "Sunshine Week" in March 2006.

APPENDIX E

Status of Freedom of Information and Other Related Access Bills Considered by the 2005 General Assembly

I. Introduction

The 2005 Session of the General Assembly passed a total of 12 bills amending the Virginia Freedom of Information Act (FOIA). One bill was recommended by the Freedom of Information Advisory Council this session: SB 711 (Houck), amending the requirements for electronic meetings. SB 711 was incorporated into the nearly-identical bill recommended by the Joint Commission on Technology and Science (JCOTS), SB 1196 (Newman). SB 1196/SB711 passed as a joint recommendation of the FOIA Council and JCOTS.

Of the 12 bills, six bills created new record exemptions to FOIA: HB 2399 adds an exemption for 911 or E-911 subscriber data collected by local governing bodies; HB 2729 adds an exemption for records of active investigations conducted by the Department of Criminal Justice Services of certain of its licensees; HB 2404 adds an exemption for proprietary records of a local wireless service authority; SB 959 adds an exemption for proprietary records of a local public body providing telecommunications and cable television services; HB 2032 adds an exemption for Statewide Alert Network records; and SB 1157 adds an exemption for records of the Judicial Inquiry and Review Commission. Two of these six, HB 2404 and SB 959, also create new closed meeting exemptions corresponding to their respective records exemptions.

In addition to SB 1196/SB 711 discussed above, four other bills amended current exemptions under FOIA: HB 2516 and SB 1109, which are identical, make technical amendments to existing provisions concerning minors' health records; SB 1023 makes a technical amendment to the existing provision concerning involuntary admission records as part of the re-codification of Title 37.1 as Title 37.2; SB 752 extends the sunset provision for electronic meetings held by the Board of Visitors of the University of Virginia.

One other bill, HB 2930, addressing voting security matters involving the State Board of Elections and local electoral boards, also creates a new closed meeting exemption within FOIA. In amending Title 24.2 (election laws), HB 2930 also exempts certain records from disclosure under FOIA and provides that "site visits" are not "meetings" subject to FOIA.

For more specific information on the particulars of each bill, please see the bill itself. Unless otherwise indicated, the changes became effective July 1, 2005.

II. Amendments to the Freedom of Information Act (section by section)

§ 2.2-3705.2. Exclusions to application of chapter; records relating to public safety.

Adds an exemption for records of subscriber data collected by or provided to a local governing body for a 911 or E-911 system. [HB 2399] (2005 Acts of Assembly, c. 410)

§ 2.2-3705.3. Exclusions to application of chapter; records relating to administrative investigations.

Adds an exemption for records of certain active investigations being conducted by the Department of Criminal Justice of licensed private investigators, bail bondsmen, bail enforcement agents, and special conservators of the peace. [HB 2729] (2005 Acts of Assembly, c. 601)

§ 2.2-3705.5. Exclusions to application of chapter; health and social services records.

Subdivision 1 of § 2.2-3705.5 is amended to provide consistency with federal regulations concerning minors' health records promulgated by the Secretary of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPPA). [HB 2516/SB 1109] (2005 Acts of Assembly, c. 181)

Subdivision 6 of § 2.2-3705.5 is amended to refer to § 37.2-818, and the current reference to § 37.1-67.3 is stricken, as part of the re-codification of Title 37.1 as Title 37.2. [SB 1023] (2005 Acts of Assembly, c. 716)

§ 2.2-3705.6. Exclusions to application of chapter; proprietary records and trade secrets.

Adds an exemption for confidential proprietary records and trade secrets developed by or for a local wireless service authority. [HB 2404] (2005 Acts of Assembly, c. 411)

Adds an exemption for confidential proprietary records and trade secrets developed and held by a local public body providing telecommunication and cable television services. [SB 959] (2005 Acts of Assembly, c. 258)

§ 2.2-3705.7. Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions.

Adds an exemption for records submitted for inclusion in the Statewide Alert Network administered by the Department of Emergency Management. [HB 2032] (2005 Acts of Assembly, c. 165)

Adds an exemption for records of the Judicial Inquiry and Review Commission made confidential by § 17.1-913. [SB 1157] (2005 Acts of Assembly, c. 508)

§ 2.2-3707. Meetings to be public; notice of meetings; recordings; minutes.

This section is amended to require that all state public bodies subject to FOIA post notice of their meetings on the Internet, and to encourage other public bodies to do the same. Additional requirements for electronic meeting minutes are also added, concerning identifying which members were physically present at a central meeting location, those who participated in the meeting through electronic communication means from remote locations, and those who monitored the meeting from other locations. [SB 1196] (2005 Acts of Assembly, c. 352)

§ 2.2-3707.01. Meetings of the General Assembly.

A new subsection is added specifying that no regular, special or reconvened session of the General Assembly may be conducted through electronic communication means. [SB 1196/SB 711] (2005 Acts of Assembly, c. 352)

§ 2.2-3708. Electronic communication meetings.

This section is amended to reduce the notice requirement for electronic meetings from 30 days to seven working days; to eliminate the 25 percent limit on the number of meetings that may be held electronically per year; to eliminate the requirement for an audio or audio/visual recording of electronic meetings, but retain the requirement that minutes be taken; to allow closed meetings to be conducted during electronic meetings; to modify the annual reporting requirement; and to add a definition of "electronic communication means;" [SB 1196/SB711] (2005 Acts of Assembly, c. 352)

§ 2.2-3709. (Effective until July 1, 2005) Meetings of Board of Visitors of the University of Virginia.

The sunset provision for this section is extended from July 1, 2005 until July 1, 2007. Reports concerning these meetings shall be submitted to the Virginia Freedom of Information Advisory Council, as well as to the Secretary of Education and the General Assembly. [SB 752] (2005 Acts of Assembly, c. 17)

§ 2.2-3711. Closed meetings authorized for certain limited purposes.

Adds an exemption that permits closed meetings to be held for the purpose of discussion or consideration of confidential proprietary information or trade secrets by a local wireless service authority, corresponding to the new records exemption to be enacted regarding the same subject matter. [HB 2404] (2005 Acts of Assembly, c. 411)

Adds an exemption that permits closed meetings to be held for the purpose of discussion or consideration of confidential proprietary information or trade secrets developed and held by a local public body providing telecommunication and cable television services, corresponding to the new records exemption to be enacted regarding the same subject matter. [SB 959] (2005 Acts of Assembly, c. 258)

Adds an exemption that permits closed meetings to be held for the purpose of discussion or consideration by the State Board of Elections or local electoral boards of voting security matters made confidential pursuant to §24.2-625.1 (see Section III, *infra*). [HB 2930] (2005 Acts of Assembly, c. 568)

III. Other Access-Related Legislation

§ 2.2-2010. Additional powers of VITA.

A new subsection is added to this existing section, as part of the dissolution of the Virginia Information Providers Network (VIPNet) and transfer of VIPNet's authority to the Virginia Information Technologies Agency (VITA). The new subsection permits VITA to fix and collect fees and charges notwithstanding the provisions of § 2.2-3704 of FOIA. Section 2.2-2032 of the current Code, which allows VIPNet to fix and collect fees notwithstanding § 2.2-3704 of FOIA, is repealed. [SB 1027] (2005 Acts of Assembly, c. 939)

§ 23-38.95. Restructuring of public institutions of higher education; public access to information.

This is a new section added as part of the legislation enabling the restructuring of public institutions of higher education. This new section provides that covered institutions continue to be subject to § 2.2-4342 of the Public Procurement Act and FOIA, but may conduct electronic meetings as state public bodies under § 2.2-3708, or pursuant to § 2.2-3709 (applicable to the Board of Visitors of the University of Virginia). [HB 2866/SB 1327] (2005 Acts of Assembly, c. 933)

§ 24.2-625.1. Election laws; voting equipment security.

This is a new section applicable to the State Board of Elections and local electoral boards. This section provides that these boards' records are not subject to disclosure under FOIA to the extent the records describe protocols for maintaining the security of ballots or voting and counting equipment, or reveal the results of risk assessments of specific local electoral procedures. This section also allows these boards' to hold closed meetings for purposes corresponding to this records exemption. It also sets forth a procedure by which two members of a local electoral board may conduct site visits to investigate compliance without the visits being considered "meetings" under FOIA. [HB 2930] (2005 Acts of Assembly, c. 568)

§ 32.1-283.4. Confidentiality of certain information and records collected and maintained by the Office of the Chief Medical Examiner.

This is a new section that provides for confidentiality of various records of the Office of the

Chief Medical Examiner (OCME). Among other provisions, it provides that records provided to OCME by public or private entities during the course of a death investigation are not subject to FOIA. [HB 1030](2005 Acts of Assembly, c. 37)

§ 37.1-70.13. Conditional release; criteria; conditions; reports.

A new subsection is added to this existing section. The new subsection requires the Department of Corrections to provide criminal history, medical and mental health, and other records to the Department of Mental Health, Mental Retardation, and Substance Abuse Services, or to the person's parole or probation officer when a person is placed on conditional release. The new subsection provides that these records are not subject to disclosure under FOIA. [HB 1997] (2005 Acts of Assembly, c. 914)

§ 59.1-443.2. Personal Information Privacy Act; restricted use of social security numbers.

This is a new section which sets forth restrictions on the use of social security numbers by any person. This new section, however, provides that it shall not apply to public bodies as defined in FOIA, nor shall it limit access to records pursuant to FOIA. [HB 2482] (2005 Acts of Assembly, c. 640)

IV. Bill Summaries of FOIA and Related Access Bills (in numerical order by bill)

A. FOIA COUNCIL RECOMMENDATIONS

ELECTRONIC MEETINGS (GENERAL REQUIREMENTS)

BILL NUMBER: Senate Bill 711

STATUS: Incorporated by General Laws into S.B. 1196

PATRON: Houck

SUMMARY: **Freedom of Information Act; electronic communication meetings.**
Reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually, (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707, (iii) allows for the conduct of closed meetings during electronic meetings, and (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science and expands the type of information required to be reported. The bill defines "electronic communication means."
The bill is a recommendation of the Freedom of Information Advisory Council.

COMMENT: See Senate Bill 1196, below.

ELECTRONIC MEETINGS (GENERAL REQUIREMENTS)

BILL NUMBER: Senate Bill 1196

STATUS: Passed

PATRON: Newman

SUMMARY: **Freedom of Information Act; electronic communication meetings.** Reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually; (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707; (iii) allows for the conduct of closed meetings during electronic meetings; (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science; and (v) expands the type of information required to be reported. The bill specifies that regular, special, or reconvened sessions of the General Assembly held pursuant Article IV, Section 6 of the Constitution of Virginia are not meetings for purposes of the electronic communication meeting provisions. The bill also defines "electronic communication means." The bill is a recommendation of the VA Freedom of Information Advisory Council and the Joint Commission on Technology and Science. This bill incorporates SB 711.

B. OTHER FOIA BILLS

STATEWIDE ALERT NETWORK

BILL NUMBER: House Bill 2032

STATUS: Passed

PATRON: Miles

SUMMARY: **Powers and duties of Department of Emergency Management; coordination of emergency services intelligence and response; Freedom of Information Act.** Provides that the Department of Emergency Management shall be responsible for the coordination, receipt, evaluation, and dissemination of emergency services intelligence and shall coordinate intelligence activities with the Department of State Police. The bill also creates a records exemption under the Virginia Freedom of Information Act for contact information, computer information, and operating schedule information submitted by an individual or agency for participation in

the Statewide Alert Network where the release of such information would compromise the security of the Statewide Alert Network or individuals participating in the Statewide Alert Network.

911 AND E-911 RECORDS

BILL NUMBER: House Bill 2399

STATUS: Passed

PATRON: Phillips

SUMMARY: **Freedom of Information Act (FOIA); public safety exemptions; certain 911 or E-911 records.** Exempts from the mandatory disclosure requirements of FOIA, subscriber data (defined as the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier) collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ 56-484.12 et seq.), and other identifying information of a personal, medical or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, if such records are not otherwise publicly available. The bill further provides that nothing shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.

LOCAL WIRELESS SERVICE AUTHORITIES

BILL NUMBER: House Bill 2404

STATUS: Passed

PATRON: Phillips

SUMMARY: **Virginia Freedom of Information Act; exemptions; local wireless service authorities.** Excludes confidential proprietary records and trade secrets developed by or for a local authority created in accordance with the Virginia Wireless Service Authorities Act (§ 15.2-5431.1 et seq.) that provides qualifying communications services as authorized by Article 5.1 (§ 56-484.7:1 et seq.) of Chapter 15 of Title 56 where disclosure of such information would be harmful to the competitive position of the authority from the mandatory disclosure requirements of the Virginia Freedom of Information Act (FOIA). The bill also grants an open meeting exemption for discussions of such records by a local wireless service authority. The bill contains technical amendments.

MINORS' HEALTH RECORDS

BILL NUMBER: House Bill 2516
STATUS: Passed
PATRON: O'Bannon
SUMMARY: **Health records privacy; minors' records.** Revises certain provisions relating to minors' health records to provide a measure of consistency with the federal regulations that were promulgated by the federal Secretary of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act concerning access to and authority to disclose protected health information.
COMMENT: This bill contains amendments to the existing FOIA exemption for health records, § 2.2-3705.5(1).

DEPARTMENT OF CRIMINAL JUSTICE SERVICES

BILL NUMBER: House Bill 2729
STATUS: Passed
PATRON: Scott
SUMMARY: **Freedom of Information Act; exemptions; Department of Criminal Justice Services.** Exempts from mandatory disclosure records of active investigations that are conducted by the Department of Criminal Justice Services involving applicants and regulants as private security, businesses, special conservators of the peace, bail bondsmen, and bail enforcement agents.

VOTING SECURITY

BILL NUMBER: House Bill 2930
STATUS: Passed
PATRON: Hugo
SUMMARY: **Voting equipment security; Freedom of Information Act provisions.** Provides limited exemptions from certain Freedom of Information Act requirements for documents and meetings of the State Board of Elections and local electoral boards pertaining to the security of ballots and voting equipment and related security risk assessment procedures.

ELECTRONIC MEETINGS (UNIVERSITY OF VIRGINIA)

BILL NUMBER: Senate Bill 752
STATUS: Passed
PATRON: Wampler

SUMMARY: **Electronic meetings of the Board of Visitors of the University of Virginia.** Extends from 2005 to 2007 the sunset for the exception to the Freedom of Information Act requirements for holding telephonic or video broadcast meetings that has been accorded to the Board of Visitors of the University of Virginia. The bill requires University of Virginia to report to the Virginia Freedom of Information Advisory Council on these meetings, in addition to the Secretary of Education and the General Assembly.

CABLE TELEVISION AND TELECOMMUNICATIONS SERVICES

BILL NUMBER: **Senate Bill 959**
STATUS: **Passed**
PATRON: **Wampler**
SUMMARY: **Telecommunication and cable television service by localities; release of information.** Exempts from the mandatory disclosure requirements of the Freedom of Information Act any public record of a local government that contains confidential proprietary information or trade secrets pertaining to its provision of telecommunication services and cable television service. Public bodies may discuss such records in closed meetings.

PERSONS WITH MENTAL ILLNESS, MENTAL RETARDATION, OR SUBSTANCE ABUSE

BILL NUMBER: **Senate Bill 1023**
STATUS: **Passed**
PATRON: **Wampler**
SUMMARY: **Recodification of Title 37.1; persons with mental illness, mental retardation, or substance abuse.** Recodifies Title 37.1 as Title 37.2. In accordance with § 30-152, the Virginia Code Commission, in 2003, undertook the recodification of Title 37.1. Title 37.1 is the legal authority for the Department of Mental Health, Mental Retardation and Substance Abuse Services under the Secretariat of Health and Human Resources, as well as the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services. Title 37.1 is also the legal authority for community services boards and behavioral health authorities. The title was last revised in 1968.

COMMENT: This bill contains a technical amendment to the existing FOIA exemption for health records regarding involuntary admission, § 2.2-3705.5(6).

MINORS' HEALTH RECORDS

BILL NUMBER: Senate Bill 1109
STATUS: Passed
PATRON: Blevins
SUMMARY: **Health records privacy; minors' records.** Revises certain provisions relating to minors' health records to provide a measure of consistency with the federal regulations that were promulgated by the federal Secretary of Health and Human Services pursuant to the Health Insurance Portability and Accountability Act concerning access to and authority to disclose protected health information. This bill is identical to HB 2516.

COMMENT: This bill contains amendments to the existing FOIA exemption for health records, § 2.2-3705.5(1).

JUDICIAL INQUIRY AND REVIEW COMMISSION

BILL NUMBER: Senate Bill 1157
STATUS: Passed
PATRON: Stolle
SUMMARY: **Judicial Inquiry and Review Commission; confidentiality; Freedom of Information Act.** Exempts the Commission from the Freedom of Information Act and also requires that ethical advice given to a judge by an attorney employed by the Commission and any attendant records be kept confidential. The bill allows the Commission to share such advice, without identifying the judge, with the judicial ethics advisory committee established by the Supreme Court.

C. OTHER RELATED ACCESS BILLS

BIRTH RECORDS; ACCESS BY GRANDPARENTS

BILL NUMBER: House Bill 1687
STATUS: Passed
PATRON: Alexander
SUMMARY: **Vital records; grandchild's birth certificate.** Requires the State Registrar or the city or county registrar to disclose data about or issue a certified copy of a birth certificate of a child to the grandparent of the child upon the written request of the grandparent when the grandparent has demonstrated to the State Registrar evidence of need, as prescribed by Board regulation, for the data or birth certificate.

FEES COLLECTED BY CLERKS OF CIRCUIT COURTS

BILL NUMBER: House Bill 1706
STATUS: Passed
PATRON: Kilgore
SUMMARY: Fees collected by clerks of circuit courts; authorization to use funds for office expenses. Provides that court clerks shall use the fees paid for copying to recoup the costs of providing the copies, with the balance of the funds paid to the Commonwealth. Funds sufficient to recoup the cost of making copies shall be deposited with the locality, which shall in turn appropriate funds to support copying costs. Such costs shall include lease and maintenance agreements, but shall not include salaries or related benefits.

VIRGINIA PUBLIC RECORDS ACT

BILL NUMBER: House Bill 1791
STATUS: Passed
PATRON: Cox
SUMMARY: Virginia Public Records Act. Makes several clarifying and technical changes to the Virginia Public Records Act. The bill removes obsolete definitions, clarifies existing definitions of "archival records" and "public records," and creates a definition for "private record," a term that is used in the Act but not currently defined. The bill removes references to the preservation of medical records, an area of law that has been superseded by other state and federal medical records laws, and programs for microfilming records by The Library of Virginia, a service not provided by The Library of Virginia. The bill also clarifies that a public record may not be destroyed or discarded unless certain requirements are met. This change codifies current practice. This bill is a recommendation of the HJR 6 study (2004).

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

BILL NUMBER: House Bill 1997
STATUS: Passed
PATRON: Griffith
SUMMARY: Civil commitment of sexually violent predators. Makes numerous changes authorizing the release of various information concerning the offender to the Attorney General, mental health examiners and the Department of Mental Health, Mental Retardation and Substance Abuse Services. The bill provides that the Office of the Attorney

General is a criminal justice agency. The bill increases the number of prisoners eligible for commitment by providing that someone who is serving concurrent or consecutive time for a non-sexually violent offense in addition to his time for a sexually violent offense will be assessed for possible commitment. The bill redefines "sexually violent offense" to include the commission of aggravated sexual battery against a person younger than 13 and assures that a committed person who commits a jailable offense will be returned to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services.

PRESCRIPTION MONITORING PROGRAM

BILL NUMBER: House Bill 2429

STATUS: Passed

PATRON: Hamilton

SUMMARY: **Prescription Monitoring Program.** Expands the Prescription Monitoring Program to include reporting by out-of-state dispensers (nonresident pharmacies) and to cover the entire Commonwealth. To assist in verifying the validity of a prescription, the bill extends the authority to query the system to prescribers licensed in other states and to pharmacists. The fourth and fifth enactment clauses of Chapter 481 of the 2002 Acts of Assembly are repealed to remove the funding contingencies and the restriction on the application of the program to a pilot project covering the southwestern region of Virginia. The program requires the reporting of "covered substances," that, pursuant to this bill, will include all controlled substances in Schedules II, III, and IV of the Drug Control Act (§ 54.1-3400 et seq.) of Title 54.1.

Emergency regulations must be promulgated by the Director. Although the bill will be effective in due course, i.e., July 1, 2005, its provisions will not be implemented or enforced until the date on which the emergency regulations become effective. The Director is required to notify all out-of-state and Virginia dispensers who will be newly subject to the reporting requirements of the Prescription Monitoring Program prior to the date on which the provisions of this act will be implemented and enforced. This bill is identical to SB1098.

PERSONAL INFORMATION PRIVACY ACT

BILL NUMBER: House Bill 2482
STATUS: Passed
PATRON: May
SUMMARY: **Personal Information Privacy Act; restricting the use of social security numbers.** Prohibits any person from (i) intentionally communicating an individual's social security number to the general public; (ii) printing an individual's social security number on any card required for the individual to access or receive products or services; (iii) requiring an individual to use his social security number to access an Internet website, unless an authentication device is also required; or (iv) mailing a package with the social security number visible from the outside. The bill exempts public bodies and public records. A violation is a prohibited practice under the Virginia Consumer Protection Act. The measure also requires the state employee's health insurance plan to use identification numbers that are not the employee's social security number.

RESTRUCTURED HIGHER EDUCATION FINANCIAL AND ADMINISTRATIVE OPERATIONS ACT

BILL NUMBER: House Bill 2866
STATUS: Passed
PATRON: Callahan
SUMMARY: **Restructured Higher Education Financial and Administrative Operations Act.** Sets forth enabling legislation for the restructuring of public institutions of higher education (institutions) that will extend, upon the satisfaction of various conditions, autonomy, which includes but is not limited to, capital building projects, procurement and personnel, while providing oversight mechanisms and establishing certain expectations. Under the bill, three levels of autonomy will be available to all public institutions of higher education with the level of autonomy depending on each institution's financial strength and ability to manage day-to-day operations. The bill also requires such institutions to develop six-year academic, financial and enrollment plans that outline tuition and fee estimates as well as enrollment projections, to develop detailed plans for meeting statewide objectives, and to accept a number of accountability measures, including meeting benchmarks related to accessibility and affordability. The bill further requires the Governor to establish an independent advisory board to develop and recommend administrative management standards for institutions. The Governor is required to submit his recommendations for the third level of autonomy as part the budget bill or amendments to the budget bill for review and approval by the General Assembly.

VIRGINIA INFORMATION TECHNOLOGIES AGENCY; VIRGINIA
INFORMATION PROVIDERS NETWORK

BILL NUMBER: Senate Bill 1027
STATUS: Passed
PATRON: Newman
SUMMARY: **Virginia Information Technologies Agency; Virginia Information Providers Network.** Dissolves the Virginia Information Providers Network as a separate division of the Virginia Information Technologies Agency (VITA) and gives its authority directly to VITA.
COMMENT: Current Code § 2.2-2032 (2004) provides that the Virginia Information Providers Network (VIPNet) may fix and collect fees and charges for its services notwithstanding the charges set forth in § 2.2-3704 of FOIA. In dissolving VIPNet, Senate Bill 1027 transfers this provision from VIPNet to VITA.

OFFICE OF THE CHIEF MEDICAL EXAMINER

BILL NUMBER: Senate Bill 1030
STATUS: Passed
PATRON: Lambert
SUMMARY: **Office of the Chief Medical Examiner; confidentiality of certain information and records collected and maintained.** Provides that confidential records and information obtained from private and public entities and provided to the Office of the Chief Medical Examiner (OCME) during the course of a death investigation and records collected and maintained during the course of investigations, surveillance programs or research or studies of deaths having a public health importance by the OCME are not subject to the provisions of the Freedom of Information Act. The bill also provides that confidential records received by the OCME from third-parties continue to be confidential and are protected from legal discovery.

PRESCRIPTION MONITORING PROGRAM

BILL NUMBER: Senate Bill 1098
STATUS: Passed
PATRON: Wampler
SUMMARY: **Prescription Monitoring Program.** Expands the Prescription Monitoring Program to include reporting by out-of-state dispensers (nonresident pharmacies) and to cover the entire Commonwealth. To

assist in verifying the validity of a prescription, the bill extends the authority to query the system to prescribers licensed in other states and to pharmacists. The fourth and fifth enactment clauses of Chapter 481 of the 2002 Acts of Assembly are repealed to remove the funding contingencies and the restriction on the application of the program to a pilot project covering the southwestern region of Virginia. The program requires the reporting of "covered substances," that, pursuant to this bill, will include all controlled substances in Schedules II, III, and IV of the Drug Control Act (§ 54.1-3400 et seq.) of Title 54.1. Emergency regulations must be promulgated by the Director. Although the bill will be effective in due course, i.e., July 1, 2005, its provisions will not be implemented or enforced until the date on which the emergency regulations become effective. The Director is required to notify all out-of-state and Virginia dispensers who will be newly subject to the reporting requirements of the Prescription Monitoring Program prior to the date on which the provisions of this act will be implemented and enforced. This bill is identical to HB 2429.

RESTRUCTURED HIGHER EDUCATION FINANCIAL AND ADMINISTRATIVE OPERATIONS ACT

BILL NUMBER: Senate Bill 1327

STATUS: Passed

PATRON: Norment

SUMMARY: **Restructured Higher Education Financial and Administrative Operations Act.** Sets forth enabling legislation for the restructuring of public institutions of higher education (institutions) that will extend, upon the satisfaction of various conditions, autonomy, which includes but is not limited to, capital building projects, procurement and personnel, while providing oversight mechanisms and establishing certain expectations. Under the bill, three levels of autonomy will be available to all public institutions of higher education with the level of autonomy depending on each institution's financial strength and ability to manage day-to-day operations. The bill also requires such institutions to develop six-year academic, financial and enrollment plans that outline tuition and fee estimates as well as enrollment projections, to develop detailed plans for meeting statewide objectives, and to accept a number of accountability measures, including meeting benchmarks related to accessibility and affordability. The bill further requires the Governor to establish an independent advisory board to develop and recommend administrative management standards for institutions. The Governor is required to submit his recommendations for the third level of autonomy as part the budget bill or amendments to the budget bill for review and approval by the General Assembly.

APPENDIX F

Breakdown of Inquiries to Council December 2004 to December 2005

The Council offers FOIA guidance to the public, representatives and employees of state and local government, and members of the news media. The Council issues both formal, written opinions as well as more informal opinions via the telephone or e-mail. At the direction of the Council, the staff has kept logs of all 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, citizens, or out-of-state callers. The logs help to 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. All opinions, whether written or verbal, are based on the facts and information provided to the Council by the person requesting the opinion. During this reporting period, the Council has answered a broad spectrum of questions about FOIA. This appendix provides a general breakdown of the type and number of issues raised by the inquiries received by the Council.

I. Who Made Inquiries of the FOIA Council

A. REQUESTS FOR WRITTEN ADVISORY OPINIONS:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|------------------------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|----------|-----------|
| Federal Government | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| State Government | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Local Government | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Law Enforcement | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 3 |
| Citizens of the Commonwealth | 4 | 0 | 1 | 0 | 1 | 2 | 0 | 2 | 1 | 0 | 0 | 0 | 11 |
| Members of the News Media | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Out-of State | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| TOTAL | 5 | 0 | 1 | 2 | 1 | 2 | 1 | 3 | 1 | 0 | 0 | 0 | 16 |

B. TELEPHONE & EMAIL INQUIRIES:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|------------------------------|-----------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|-------------|
| Federal Government | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| State Government | 21 | 20 | 26 | 32 | 24 | 38 | 55 | 29 | 33 | 28 | 22 | 32 | 360 |
| Local Government | 21 | 26 | 23 | 29 | 34 | 39 | 37 | 17 | 27 | 24 | 22 | 26 | 325 |
| Law Enforcement | 5 | 6 | 7 | 7 | 6 | 2 | 8 | 6 | 4 | 7 | 8 | 3 | 69 |
| Citizens of the Commonwealth | 38 | 55 | 43 | 67 | 69 | 53 | 55 | 40 | 49 | 55 | 43 | 60 | 627 |
| Members of the News Media | 9 | 34 | 21 | 16 | 26 | 19 | 24 | 13 | 14 | 12 | 12 | 9 | 209 |
| Out-of State | 4 | 8 | 7 | 8 | 3 | 0 | 7 | 6 | 4 | 4 | 5 | 4 | 60 |
| TOTAL | 98 | 149 | 127 | 159 | 164 | 151 | 186 | 111 | 131 | 130 | 112 | 134 | 1652 |

II. Types of Inquiries Received

A. RECORDS INQUIRIES:

1. Inquiries regarding FOIA procedures for records requests:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|--|-----|-----|-----|-----|-----|-----|------|-----|-----|------|-----|-----|-------|
| Making a request (i.e. how to make a request, who may request records, custodian of record, etc.) | 5 | 13 | 9 | 11 | 16 | 15 | 11 | 4 | 5 | 11 | 10 | 6 | 116 |
| Responding to a request (i.e. response time, appropriate response, FOIA applies to existing records, etc.) | 11 | 13 | 12 | 15 | 33 | 26 | 15 | 18 | 20 | 19 | 13 | 20 | 215 |
| Charges for records | 5 | 8 | 7 | 15 | 10 | 15 | 14 | 4 | 23 | 5 | 6 | 9 | 121 |

| | | | | | | | | | | | | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| Definition of "public records" | 7 | 2 | 4 | 5 | 5 | 1 | 3 | 1 | 4 | 4 | 0 | 6 | 42 |
| Format of records | 0 | 1 | 0 | 1 | 0 | 1 | 1 | 1 | 1 | 1 | 0 | 2 | 9 |
| Other inquiries regarding FOIA procedure for records requests | 0 | 1 | 0 | 2 | 0 | 1 | 0 | 0 | 1 | 3 | 0 | 0 | 8 |
| SUBTOTAL | 28 | 38 | 32 | 49 | 64 | 59 | 44 | 28 | 54 | 43 | 29 | 43 | 511 |

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|--|-----|-----|-----|-----|-----|-----|------|-----|-----|------|-----|-----|-------|
| Draft records | 1 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 1 | 2 | 6 |
| E-mail as a public record | 4 | 5 | 2 | 4 | 3 | 0 | 2 | 0 | 1 | 1 | 0 | 2 | 24 |
| Court records | 3 | 1 | 4 | 2 | 5 | 6 | 5 | 4 | 3 | 1 | 4 | 6 | 44 |
| Personnel records (including access to salary & job position of public employees) | 11 | 13 | 15 | 11 | 17 | 19 | 5 | 7 | 12 | 12 | 9 | 8 | 139 |
| Licensing records exemption | 1 | 0 | 1 | 0 | 1 | 0 | 2 | 2 | 0 | 1 | 0 | 0 | 8 |
| Law enforcement records | 16 | 17 | 11 | 15 | 9 | 12 | 17 | 13 | 11 | 11 | 12 | 9 | 153 |
| Tax records exemption | 2 | 2 | 3 | 3 | 0 | 2 | 1 | 1 | 3 | 4 | 1 | 3 | 25 |
| Scholastic records exemption | 3 | 0 | 5 | 3 | 2 | 4 | 1 | 0 | 3 | 9 | 0 | 3 | 33 |
| Medical records exemption | 0 | 1 | 0 | 2 | 1 | 0 | 1 | 0 | 6 | 1 | 0 | 0 | 12 |
| Working papers exemption | 3 | 4 | 1 | 1 | 0 | 1 | 5 | 1 | 5 | 2 | 3 | 5 | 31 |

| | | | | | | | | | | | | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| Attorney/client privilege & work product exemptions | 0 | 1 | 1 | 0 | 4 | 1 | 2 | 3 | 0 | 2 | 0 | 1 | 15 |
| Terrorism & public safety | 0 | 2 | 0 | 1 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 6 |
| Procurement | 0 | 1 | 1 | 1 | 4 | 1 | 4 | 2 | 2 | 1 | 1 | 2 | 20 |
| Other inquiries regarding specific types of records or exemptions | 17 | 15 | 10 | 14 | 13 | 15 | 13 | 9 | 16 | 11 | 6 | 12 | 151 |
| SUBTOTAL | 61 | 62 | 54 | 57 | 61 | 61 | 59 | 43 | 62 | 57 | 37 | 53 | 667 |

3. Total number of records-related inquiries:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|--------------|-----------|------------|-----------|------------|------------|------------|------------|-----------|------------|------------|-----------|-----------|-------------|
| TOTAL | 89 | 100 | 86 | 106 | 125 | 120 | 103 | 71 | 116 | 100 | 66 | 96 | 1178 |

II. Types of Inquiries Received (CON'T)

B. MEETING INQUIRIES:

1. Inquiries regarding FOIA procedures for records requests:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|----------------------------------|-----|-----|-----|-----|-----|-----|------|-----|-----|------|-----|-----|-------|
| Definition of a "meeting" | 0 | 6 | 5 | 8 | 8 | 5 | 5 | 4 | 10 | 10 | 2 | 3 | 66 |
| Closed meeting procedure | 3 | 3 | 2 | 5 | 4 | 4 | 6 | 1 | 5 | 2 | 5 | 4 | 44 |
| Electronic meetings | 8 | 2 | 0 | 1 | 3 | 4 | 3 | 2 | 3 | 2 | 0 | 6 | 34 |
| Voting | 2 | 2 | 0 | 0 | 4 | 5 | 5 | 0 | 1 | 2 | 1 | 1 | 23 |
| Minutes | 1 | 3 | 0 | 2 | 1 | 3 | 4 | 0 | 4 | 6 | 0 | 2 | 11 |
| Chance meetings | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 5 | 3 | 1 | | 11 |
| Agenda | 1 | 1 | 1 | 2 | 2 | 0 | 0 | 0 | 1 | 2 | 0 | 1 | 11 |
| Notice | 1 | 5 | 2 | 1 | 0 | 3 | 5 | 1 | 3 | 3 | 4 | 3 | 31 |
| Public Comment | 0 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 2 | 6 |
| Polling | 1 | 0 | 0 | 0 | 2 | 3 | 1 | 0 | 0 | 0 | 0 | 2 | 9 |

| | | | | | | | | | | | | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|
| Special & emergency meetings | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 1 | 5 |
| Public forum | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | | 0 |
| Agenda packets | 0 | 0 | 0 | 0 | 3 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 5 |
| Other inquiries regarding procedural matters | 1 | 3 | 1 | 2 | 3 | 1 | 3 | 3 | 4 | 3 | 1 | 2 | 27 |
| SUBTOTAL | 19 | 27 | 11 | 22 | 30 | 29 | 33 | 12 | 37 | 34 | 16 | 28 | 283 |

2. Inquiries Regarding the Subject Matter of Meetings and Meeting Exemptions:

| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
|--|------------|------------|------------|------------|------------|------------|-------------|------------|------------|-------------|------------|------------|--------------|
| Personnel | 1 | 5 | 1 | 1 | 8 | 1 | 0 | 1 | 5 | 3 | 0 | 1 | 27 |
| Real Estate | 0 | 0 | 0 | 2 | 1 | 0 | 2 | 0 | 2 | 1 | 0 | 0 | 8 |
| Consultation with legal counsel | 1 | 0 | 2 | 1 | 1 | 0 | 2 | 0 | 0 | 0 | 2 | 1 | 10 |
| Scholastic | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Terrorism & public safety | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Other inquiries regarding subject-matter | 1 | 2 | 3 | 1 | 0 | 3 | 2 | 2 | 2 | 1 | 1 | 2 | 20 |
| SUBTOTAL | 3 | 7 | 7 | 5 | 10 | 4 | 6 | 3 | 9 | 5 | 3 | 4 | 66 |
| | Dec | Jan | Feb | Mar | Apr | May | June | Jul | Aug | Sept | Oct | Nov | TOTAL |
| TOTAL | 22 | 34 | 18 | 27 | 40 | 33 | 39 | 15 | 46 | 39 | 19 | 32 | 349 |

APPENDIX G

FOIA Case Study *Lee Albright versus Virginia Department of Game and Inland Fisheries*²⁸

I. Introduction

At the June 15, 2005 meeting of the FOIA Council, Lee Albright, a Nelson County citizen, advised the Council of his attempts to get records from the Virginia Department of Game and Inland Fisheries (VDGIF) and of the need to file lawsuits to gain access to the requested records. He discussed the favorable outcome of his most recent FOIA suit against VDGIF for violation of FOIA. Mr. Albright indicated that he had received advisory opinions from the Council on this issue, but unfortunately, those opinions did not seem to influence the Department's actions. Mr. Albright expressed concern that a lawsuit was the only remedy under FOIA to force a public body to comply with the law. As a result of Mr. Albright's comments, the Council requested staff to prepare a report chronicling Mr. Albright's efforts to get records under FOIA and the disposition of his lawsuits. The members of the Council shared Mr. Albright's concern that citizens should not have to endure the difficulties Mr. Albright has encountered, especially in light of the mandatory disclosure requirements of FOIA. The Council agreed to examine the issue of whether FOIA should be amended to provide additional remedies for violation.

This memorandum describes Mr. Albright's experiences in seeking records from VDGIF during the period November, 2003, when he first contacted the FOIA Council office, until the present time.²⁹ During that time period Mr. Albright made many FOIA requests of VDGIF, several of which became the subjects of dispute. Because many of the events concerning different requests overlap in time, this memorandum is arranged in a topical manner to follow the course of different requests as they were made, disputed, and resolved, rather than following a strict chronology. This memorandum describes Mr. Albright's contacts with VDGIF, the FOIA Council, and the legal system, what FOIA issues arose as a result of his requests, and whether and how those issues have been resolved. Over the course of approximately two years there have been dozens of news articles published concerning Mr. Albright's requests and difficulties with VDGIF, and dozens of letters sent between the parties. This memorandum is necessarily limited in scope and does not attempt to address all of these matters in detail, but focuses upon the events of greatest import as they relate to FOIA.

²⁸ Memorandum dated August 31, 2005 from Alan Gernhardt, Council staff attorney, to the members of the Council.

²⁹ Note that Paulette Albright, Mr. Albright's wife, has also been involved in these events described in this memorandum. For the sake of consistency, this memorandum hereinafter refers solely to "Mr. Albright."

Section II of this memorandum focuses upon the two advisory opinions issued to Mr. Albright by the FOIA Council and the three lawsuits Mr. Albright has filed against VDGIF related to his FOIA requests. Section III briefly describes a report issued in May, 2005, by the State Internal Auditor following an investigation of VDGIF that followed an anonymous tip to the State Employee Fraud, Waste, and Abuse Hotline. News reports have indicated that many of the documents uncovered through Mr. Albright's FOIA requests were used as support for the anonymous tip and as evidence in the investigation leading up to the report. Section IV provides an update on the current status of Mr. Albright's requests and disputes with VDGIF.

II. Advisory Opinions and Lawsuits

Between November, 2003, and the present date, Mr. Albright requested and received two formal advisory opinions from the FOIA Council and sued VDGIF regarding three different FOIA-related matters. The first advisory opinion and lawsuit concerned the same matter, a request for salary records, which was ultimately settled out of court before trial. The second advisory opinion concerned a dispute over a request for meeting minutes that was never fully resolved. The other lawsuits concerned separate issues relating to different FOIA requests. One was a dispute over the provision of advanced cost estimates, which resulted in a decision in Mr. Albright's favor from the General District Court of the City of Lynchburg. The other was a dispute over the charges assessed for records provided to Mr. Albright, which has resulted in decisions in Mr. Albright's favor from the Circuit Court of Nelson County. Each of these matters is described separately in more detail below.

A. Dispute over costs for salary records; first advisory opinion; out-of-court settlement

Mr. Albright first called the FOIA Council office regarding VDGIF in November of 2003. At that time he indicated that he had been trying to get financial and other information from VDGIF in an attempt to better understand the decision to close the Montebello fish hatchery. The FOIA issues at this time included a failure to respond to his requests within the time period prescribed by FOIA, the reasonableness of charges for staff time spent observing Mr. Albright as he inspected public documents, and charges for creating new records when the requester did not agree to the creation of new records. Mr. Albright had asked to inspect three years worth of salary records of VDGIF employees. VDGIF responded by creating spreadsheets containing salary and benefits data, and offering to provide copies of these spreadsheets at a charge of \$207.50. FOIA Council staff contacted VDGIF in an attempt to resolve this dispute informally, and there was correspondence between Mr. Albright and VDGIF regarding these issues over the next few months. An additional question arose as to whether a public body could charge for time spent addressing a dispute over charges.

Mr. Albright requested a formal opinion from the FOIA Council asking whether (1) he was obligated to pay the \$207.50 charge, (2) a request for salary records is an exception to the rule that a public body must first reach an agreement with a requester before creating new records, (3) a public body can increase its charges for a records request then agree to charge only the original cost as an "exception," and (4) a public body may charge for time spent disputing the amount of charges for a FOIA request. Advisory Opinion 04 was issued on March 19, 2004 to address these questions. That advisory opinion stated that charges for copies are inappropriate when the requester specifically asked to inspect records, not to have copies made. While FOIA does require that the salary records of public employees be disclosed upon request, FOIA does not require a public body to create new records to satisfy such a request. Furthermore, FOIA does not permit a public body to charge a requester for the creation of new records unless it first reaches an agreement with the requester to do so, especially when the request asked to inspect records, rather than to be provided with copies of records. That the requested records are salary records does not change this result. Additionally, it is not appropriate to charge for staff time spent in disputing the charges assessed to a requester, as FOIA limits charges to the "actual cost incurred in accessing, duplicating, supplying, or searching for the requested records." To allow such charges for time spent disputing FOIA charges would deter citizens from making good-faith inquiries about the costs of records requests, as citizens could then be charged for the time taken to respond to their inquiries. Such a result would be detrimental to the stated purposes and policy of FOIA. The advisory opinion concluded that it did not appear that VDGIF could require Mr. Albright to pay \$207.50 before allowing him to inspect records as he originally requested.

Following the issuance of the advisory opinion, it appears that VDGIF provided some records, but failed to provide all of the records for inspection as requested. Mr. Albright informed FOIA Council staff that problems continued for several months after the advisory opinion was issued. He subsequently brought suit against VDGIF regarding this request and the charges assessed by VDGIF. However, an out-of-court settlement was reached in August, 2004, before the case went to trial. Ultimately, Mr. Albright received the records without charge after approximately ten months of dispute with VDGIF over these records. As part of the settlement, VDGIF paid court costs and attorney's fees, but admitted to no wrongdoing in this matter.

B. Dispute regarding meeting minutes; second advisory opinion; resignation

On March 3, 2004, Mr. Albright sent a letter to Mr. Daniel Hoffler, then the Chairman of the Board of VDGIF, that expressed concerns and asked questions regarding spending priorities, management decisions, and FOIA compliance by VDGIF. The letter contained several questions within each of these topic categories, but did not make any specific FOIA requests. Mr. Hoffler indicated in reply that the Board had been consulted and supported the decisions made regarding all of the issues raised in Mr. Albright's letter. On March 19, 2004, Mr. Albright then made a FOIA request for the meeting minutes that reflected this consultation and support by the Board. A series of letters was then sent between the parties concerning this request, without a satisfactory resolution. Some delay occurred because Mr. Albright and VDGIF were involved in the first dispute concerning salary records during this time period.

After several months of correspondence, and after the earlier dispute over salary records was resolved, Mr. Albright requested a second formal opinion from the FOIA Council regarding the provision of the requested meeting minutes. Advisory Opinion 25 was issued in December, 2004, and discussed

FOIA's requirement that minutes be taken of open meetings and that such minutes are subject to inspection and copying upon request. The opinion also addressed the addition to FOIA of specific requirements for the content of meeting minutes, effective July 1, 2004. Due to the adversarial nature of the correspondence between the parties, the opinion also emphasized the need for clear communications between public bodies and requesters, reminding both that FOIA is not meant to be an adversarial process.

Several months after the issuance of this advisory opinion, Mr. Albright informed Council staff that he never received a satisfactory response to this records request. However, he stated that he let the matter drop after Mr. Hoffler's resignation as Chairman in March of this year, as it was Mr. Hoffler's reply that prompted this request originally. Mr. Albright further stated that he believes many of the records he requested simply do not exist, but VDGIF was unwilling to admit that fact.

C. Estimates not provided until suit filed; court ordered attorney's fees

In three separate records request letters all dated December 3, 2004, Mr. Albright asked that estimates be provided in advance for each request. VDGIF provided a single lump-sum estimate for all of the records, rather than separate estimates for each request as Mr. Albright had requested. Mr. Albright then specifically requested a separate estimate for each request. VDGIF did not provide the requested estimates, but instead responded by stating that its prior estimate did not include redaction costs and did not reflect prior work. In January, 2005, Mr. Albright brought a petition in general district court over this refusal to provide separate estimates. The day before trial, VDGIF provided estimates that satisfied Mr. Albright's original request. However, the matter went to court on the issue of attorney's fees incurred in filing this suit. The City of Lynchburg General District Court awarded attorney's fees to Mr. Albright of \$750 by decision dated June 10, 2005. This decision has not been appealed. However, Mr. Albright indicated that as of August 22, 2005, the award has not yet been paid. Additionally, Mr. Albright stated that he did not seek an advisory opinion from the FOIA Council regarding this dispute over estimates because his past experience showed he would end up having to file suit anyway.

D. Dispute over costs for financial records; on-going FOIA litigation

In October, 2004, Mr. Albright requested certain financial records from VDGIF, including credit card statements, travel vouchers, and receipts for purchases, which were provided in a redacted form at a cost of \$3,000. Mr. Albright paid the \$3,000 charge in order to receive the records, but filed suit in circuit court as he did not believe the charges were justified. For example, it appears that one of the charges was for travel, meal and overnight hotel expenses, as well as staff time, for a VDGIF employee to travel to Richmond to spend five hours reviewing records. Additionally, Mr. Albright felt that several exemptions were used improperly in redacting the records provided. Mr. Albright sued and won in general district court; the court awarded a cost reduction of \$789. However, Mr. Albright appealed the case to circuit court, believing that the charges were still too high even after the reduction. The circuit court judge again found in favor of Mr. Albright. The charges were reduced from \$3,000 to approximately \$2000, and the Court ordered VDGIF to re-produce 103 improperly redacted pages of records. The Court's most recent letter opinion dated August 4, 2005, indicated that Mr. Albright has substantially prevailed on the merits of this case and awarded \$3,000 to Mr. Albright in attorney's fees. As of August 22, 2005, Mr. Albright indicated that he has not yet received any of the unredacted pages or attorney's fees awarded by the court, and further indicated that the matter is still in dispute.

III. State Internal Auditor's Report

As a result of anonymous tip to the Virginia Employee Fraud, Waste and Abuse Hotline, the State Internal Auditor investigated various allegations against VDGIF Board members and employees, as detailed in a 52-page report dated May 23, 2005 ("SIA Report").³⁰ Various news media reported that this anonymous tip was supported by documents uncovered as a result of Mr. Albright's FOIA requests. While a detailed description of the SIA Report is beyond the scope of this memorandum, substantiation was found for 24 out of 29 allegations regarding, among other issues, intimidation and retaliation against employees, inappropriate use of state resources and charge cards, improper promotion procedures and failure to follow human resources policies, apparent conflicts of interest, lack of controls over expenditures and field testing of items, and non-compliance with financial accounting requirements. Of particular relevance to FOIA were allegations that certain employees and Board members of VDGIF attempted to suppress FOIA responses by VDGIF and retaliate against VDGIF employees that provided information to requesters. For example, in presenting general recommendations, page 7 of the SIA Report describes a closed Board meeting wherein the former Chairman and Director of VDGIF "allegedly said that the agency was going to find which employees were leaking information to the FOIA requestors and get rid of them." As one finding of fact substantiating an allegation of employee retaliation and intimidation, on page 11 the SIA Report describes an allegation that a VDGIF officer called several game wardens to the Richmond Headquarters and "stated that he would soon find out who was helping the FOIA requestors and get rid of them."

IV. Current status and conclusion

To summarize, Mr. Albright's initial dispute with VDGIF concerned a request for salary records made in October, 2003. An advisory opinion regarding this dispute was issued in March, 2004. After several months of further correspondence between the parties, Mr. Albright sued VDGIF. An out-of-court settlement was reached resolving this dispute in August, 2004.

The second dispute concerned a request made in March, 2004, for meeting minutes of the Board of VDGIF. An advisory opinion regarding this second dispute was issued in December, 2004. This dispute was never resolved, but Mr. Albright let the matter drop after the resignation of the Chairman of the Board of VDGIF in March, 2005.

The third dispute arose after three records requests made in December, 2004, in which Mr. Albright asked for separate advance estimates. While Mr. Albright did receive the desired estimates, he only did so after filing suit, and this dispute was ultimately resolved by a court decision in Mr. Albright's favor in June, 2005.

The fourth dispute arose from a request initially made in October, 2004. While court decisions in Mr. Albright's favor regarding this fourth dispute were issued in June, 2005, and August, 2005, it appears that further litigation may be on-going at this time.

³⁰ Memorandum dated May 23, 2005 from Merritt L. Cogswell, State Internal Auditor, to the Honorable William H. Leighty, Chief of Staff to the Governor.

Additionally, it appears that the records generated from Mr. Albright's FOIA requests may have been used to support the State Internal Auditor's investigation of VDGIF earlier this year. While the allegations in the SIA Report raise concerns in regard to FOIA as well as other areas, it appears that significant changes have occurred and continue to be made within VDGIF. Both the Chairman of the Board and the Director of VDGIF have resigned from their positions. As previously stated, the Chairman resigned in March, 2005; the Director resigned in May, 2005. VDGIF now has a new acting Director, Col. Gerald Massengill, formerly of the Virginia State Police.³¹ At least one other Board member resigned in June, 2005. In addition, it appears that some of the higher-ranking employees named in the SIA Report have also resigned, and news reports have described other organizational changes within VDGIF. News reports have also indicated that a criminal investigation by the Virginia State Police is ongoing into the matters described in the SIA Report.

Finally, three newspaper articles are included in the appendix to this memorandum marked "Sample Newspaper Articles." It appears that dozens of articles, editorials, and commentaries have been published about Mr. Albright's encounters with VDGIF and the SIA Report in various media. The three articles included herein are representative of the reporting on Mr. Albright's experiences in seeking documents from VDGIF through FOIA, and on current events at VDGIF that have resulted from the SIA Report.

³¹ Mr. Albright has indicated that Col. Massengill has been very supportive and helpful regarding Mr. Albright's FOIA issues with VDGIF, describing his current interaction with Col. Massengill as a "180 degree turnaround" from the adversarial encounters he had with former VDGIF staff and officials.

APPENDIX H

PUBLIC NOTICE AND ACCESS TO PROCUREMENT RECORDS UNDER THE VPPA, PPTA, AND PPEA

To provide context for those unfamiliar with the laws governing procurement by state and local government, whether under the Virginia Public Procurement Act (VPPA), the Public-Private Transportation Act of 1995 (PPTA) or the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA), the table below provides a comparison between these acts as they relate to the stages of required public notice and/or availability of procurement records. Relevant provisions of the VPPA, PPTA, and PPEA are appended hereto.

| Public Notice of, and Public Access to Procurement Records | VPPA | PPTA | PPEA |
|---|---|---|---|
| 1. Public notice of proposed procurement action: | Yes | Yes | Yes |
| <u>Solicited bids/proposals:</u> | | | |
| When notice required-- | <i>CSB</i> --10 days prior to date set for receipt of bids | <i>CSB</i> --10 days prior to date set for receipt of bids | <i>CSB</i> --10 days prior to date set for receipt of bids |
| | <i>CN</i> --10 days prior to date set for receipt of proposals | <i>CN</i> --10 days prior to date set for receipt of proposals | <i>CN</i> --10 days prior to date set for receipt of proposals |
| Method of notice-- | <i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also post on DGS website. | <i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also post on DGS website. | <i>CSB</i> --Posting in public area OR in newspaper, or both. <i>CN</i> --Posting in a designated public area AND newspaper. State public bodies must also post on DGS website. |
| <u>Unsolicited proposals:</u> | | | |
| When notice required-- | Not applicable | 90 days if no federal oversight; 120 days if federal oversight | Within a reasonable time after acceptance of unsolicited proposal, but not 45 days. |

| Public Notice of, and Public Access to Procurement Records | VPPA | PPTA | PPEA |
|--|--------------------------------------|---|---|
| Method of notice-- | Not applicable | eVA | Advertise in "VA Business Opportunities" and eVA |
| 2. Exclusion for trade secret and proprietary records? | Yes, if "earmarked" upon submission. | Same. (Requirement for earmarking found in applicable FOIA exemption) | Same. (Requirement for earmarking found in applicable FOIA exemption) |
| 3. Exclusion for cost estimates relating to a proposed procurement transaction prepared by or for a public body? | Yes | Yes | Yes |
| 4. Preview rights by competitors? | Yes | No | No |
| 5. Public access to procurement records (minus trade secrets and proprietary information). | After award of contract | After agreement entered into | After agreement entered into |
| 6. Status of procurement records if no award | Closed | Closed | Closed |

Relevant Provisions of the Virginia Public Procurement Act (VPPA) (§ 2.2-4300 et seq.)

§ 2.2-4301 Definition of:

"Competitive negotiation"--...

Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, publishing by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, proposals may be solicited directly from potential contractors.

"Competitive sealed bidding"--...

- Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. Public notice may also be published on the Department of General Services' central electronic procurement website and other appropriate websites. Effective July 1, 2002, posting by state agencies, departments and institutions on the public Internet procurement website designated by the Department of General Services shall be required. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.
- Public opening and announcement of all bids received.
- Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

- Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

§ 2.2-4342 A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the public body decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

E. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

Relevant Provisions of the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA) (§ 56-575.1 et seq.)

§ 56-575.16. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) and any interpretations, regulations, or guidelines of the Division of Engineering and Buildings of the Department of General Services or the Virginia Information Technologies Agency, including the Capital Outlay Manual and those interpretations, regulations or guidelines ... shall not apply to this chapter. However, a responsible public entity may enter into a comprehensive agreement only in accordance with procedures adopted by it as follows:

1. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with procurement through competitive sealed bidding as defined in § 2.2-4301 and subsection B of § 2.2-4310.

2. A responsible public entity may enter into a comprehensive agreement in accordance with procedures adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. ...

4. **A responsible public entity shall not proceed to consider any request by a private entity** for approval of a qualifying project pursuant to subsection A of § 56-575.4 **until the responsible public entity has adopted and made publicly available** procedures that are sufficient to enable the responsible public entity to comply with this chapter. Such procedures shall: ...

b. Provide for the posting and publishing of public notice of a private entity's request for approval of a qualifying project pursuant to subsection A of § 56-575.4 and a reasonable time period, determined by the responsible public entity to be appropriate to encourage competition and public-private partnerships pursuant to the goals of this chapter, such reasonable period not to be less than 45 days, during which the responsible public entity will receive competing proposals pursuant to that subsection.

Such procedures shall also require advertising the public notice in the Virginia Business Opportunities publication and posting a notice on the Commonwealth's electronic procurement website.

5. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with § 2.2-4342.

6. A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body.

Relevant Provisions of the Public-Private Transportation Act Of 1995 (PPTA) (§ 56-556 et seq.)

§ 56-573.1. Procurement.

The Virginia Public Procurement Act (§ 2.2-4300 et seq.) shall not apply to this chapter; however, a responsible public entity may enter into an interim or a comprehensive agreement only in accordance with guidelines adopted by it as follows:

1. A responsible public entity may enter into an interim or a comprehensive agreement in accordance with guidelines adopted by it that are consistent with procurement through "competitive sealed bidding" as defined in § 2.2-4301 and subsection B of § 2.2-4310.
2. A responsible public entity may enter into an interim or a comprehensive agreement in accordance with guidelines adopted by it that are consistent with the procurement of "other than professional services" through competitive negotiation as defined in § 2.2-4301 and subsection B of § 2.2-4310. Such responsible public entity shall not be required to select the proposal with the lowest price offer, but may consider price as one factor in evaluating the proposals received. Other factors that may be considered include (i) the proposed cost of the qualifying transportation facility; (ii) the general reputation, qualifications, industry experience, and financial capacity of the private entity; (iii) the proposed design, operation, and feasibility of the qualifying transportation facility; (iv) the eligibility of the facility for priority selection, review, and documentation timelines under the responsible public entity's guidelines; (v) local citizen and public entity comments; (vi) benefits to the public;

(vii) the private entity's compliance with a minority business enterprise participation plan or good faith effort to comply with the goals of such plan; (viii) the private entity's plans to employ local contractors and residents; (ix) the safety record of the private entity; (x) the ability of the facility to address the needs identified in the appropriate state, regional or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency; and (xi) other criteria that the responsible public entity deems appropriate.

A responsible public entity shall proceed in accordance with the guidelines adopted by it pursuant to subdivision 1 unless it determines that proceeding in accordance with the guidelines adopted by it pursuant to this subdivision is likely to be advantageous to the responsible public entity and the public, based on (i) the probable scope, complexity, or urgency of a project; (ii) risk sharing including guaranteed cost or completion guarantees, added value, or debt or equity investments proposed by the private entity; or (iii) an increase in funding, dedicated revenue source or other economic benefit that would not otherwise be available.

When the responsible public entity determines to proceed according to the guidelines adopted by it pursuant to this subdivision, it shall state the reasons for its determination in writing. If a state agency is the responsible public entity, the approval of the Secretary of Transportation shall be required as more specifically set forth in the guidelines before the comprehensive agreement is signed.

3. Interim or comprehensive agreements for maintenance or asset management services for a transportation facility that is a highway, bridge, tunnel or overpass, and any amendment or change order thereto that increases the highway lane-miles receiving services under such an agreement shall be procured in accordance with guidelines that are consistent with procurement through "competitive sealed bidding" as defined in § 2.2-4301 and subsection B of § 2.2-4310. Furthermore, such contracts shall be of a size and scope to encourage maximum competition and participation by agency prequalified contractors and otherwise qualified contractors.

4. The provisions of subdivision 3 shall not apply to maintenance or asset management services agreed to as part of the initial provisions of any interim or comprehensive agreement entered into for the original construction, reconstruction, or improvement of any highway pursuant to Chapter 22 (§ 56-556 et seq.) of Title 56.

5. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with § 2.2-4342.

6. Nothing in this section shall require that professional services be procured by any method other than competitive negotiation in accordance with the Virginia Public Procurement Act (§ 2.2-4300 et seq.).

Source: Virginia Freedom of Information Advisory Council (November, 2005)



PPEA Subcommittee
of the
Virginia Freedom of Information Advisory Council
July 2005

A. INTRODUCTION

At its first meeting on June 8, 2005, the Public Private Education Facilities and Infrastructure Act (PPEA) subcommittee discussed the current FOIA records exemption found at § 2.2-3705.6 (11). This subcommittee was created as a result of HB 2672 (Delegate Plum), which was referred to the FOIA Council for study by the 2005 General Assembly. The reason for referral to the FOIA Council (and hence the creation of the subcommittee) was not so much a problem with HB 2672 itself, but the confusion regarding the nature and extent of records covered by the applicable FOIA record exemption. There was also concern that the FOIA record exemption for PPEA and PPTA proposals was used to withhold more records than are authorized under the exemption. As a result of its initial discussions, the PPEA subcommittee agreed that the balance necessary for the development of good public policy was to facilitate competition while ensuring the public confidence in the decisions of government, especially when expending substantial public funds. The subcommittee identified the issues outlined in section B of this document as warranting further examination. In addition, issues relating to public access to PPEA procurement records raised by the PPEA Model Guidelines Workgroup created pursuant to Chapter 865 of the 2005 Acts of Assembly are included in this document as section C.

B. ISSUES TO BE CONSIDERED

| Issue | Current Law | Options |
|--|--|---|
| 1. Identification of records actually exempted by FOIA for PPEA and PPTA projects | See § 2.2-3705.6 (11) ¹ | Does the universe need to be expanded or contracted or left unchanged? |
| 2. Define "confidential proprietary records." | "Procurement records shall not be interpreted to include proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets that may be provided by the private entity as evidence of its qualifications." See 2.2-3705.6 (11) | PPEA/PPTA only OR as defined term in FOIA (applicable to all proprietary record exemptions) OR as defined term in VPPA OR all of the above. |
| 3. Affirmative declaration and/or agreement by a public entity that certain records will be considered proprietary and thus protected from disclosure. | Nothing to prohibit or require in law. | PPEA/PPTA only OR as defined term in FOIA (applicable to all proprietary record exemptions) OR as defined term in VPPA OR all of the above. |
| 4. Specific time lines for release of records related to PPEA projects. | §§ 55-573.1 and 56-575.16--"Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, a responsible public entity shall make available, upon request, procurement records in accordance with § 2.2-4342." | Amend PPEA to provide for release of records once an interim agreement has been entered into |
| 5. Interim versus comprehensive agreements, and when records related to each must be made available. | Not specified in the law. SB 1107 (05) eff. 7/1/05 | Amend § 56-575.16 to specify time for release of records when interim or comprehensive agreement(s) are entered into. |
| 6. Disclosure by school boards to the local governing bodies responsible for approving funding for school construction. | §56-575.16 E--"A responsible public entity that is a school board or a county, city or town may enter into a comprehensive agreement under this chapter only with the approval of the local governing body. " | Specify what records must be made available to local governing body by school board as part of approval process by local governing body. |

| | | |
|--|---|--|
| 7. Use of term "working papers" in FOIA PPEA exemption | "Working papers" is a defined term in FOIA; not applicable in this context. See § 2.2-3705.6 (11) ² | Use another term of art to convey same meaning OR Leave unchanged b/c context requires a different meaning. |
|--|---|--|

C. OTHER ISSUES FROM PPEA MODEL GUIDELINES WORKGROUP (Chapter 865, 2005 Acts of Assembly (SB 1107 (2005)))

| ISSUE | Current law | Options | Comment |
|--|---|---|----------------|
| Review of FOIA disclosure under Section II D of PPEA Model Guidelines | Second enactment of chapter 865 of 2005 Acts of Assembly (SB 1107) ³ | Recommend revisions to Section II D of Model Guidelines | |
| Disclosure of records limited to those subject to interim agreement vs. other documents submitted unrelated to interim agreement--status of latter records | No existing provisions in either FOIA or PPEA that address this issue. | Amend FOIA and/or the PPEA to specify what records must be released OR specify what records are exempt. | |
| If discussions are memorialized, status of those records wrt FOIA | Unless covered by FOIA exemption, records are open | Specify status of these records in FOIA (see also No. 7 above) | |
| Codify DGS practice of publishing unsolicited proposal as well as any other proposals received. | | | |
| Clarification of what is exempted from FOIA and what is presumed open. | See also Nos. 1 and 5 above | See also Nos. 1 and 5 above | |
| Amendment of § 56-575.4 G of PPEA wrt "an agreement." | See also Nos. 1 and 5 above | See also Nos. 1 and 5 above | |
| Trigger for disclosure of records with interim agreement vs. comprehensive agreement. | See also Nos. 1 and 5 above | See also Nos. 1 and 5 above | |
| Release of conceptual phase records prior to initiating detailed phase | Ch. 865 2005 Acts of Assembly (SB 1107) and Section IV B 4 of PPEA Model Guidelines | | |

APPENDIX J

Legislative History of § 2.2-3708 Electronic Communications Meetings under FOIA

| Year | Chapter/Act of Assembly | Effect of Amendment | Comment |
|------|-------------------------|---|---|
| 1984 | c. 252 | Electronic communication meetings prohibited (§ 2.1-343.1) | Enacted as result of <i>Roanoke City School Board v. Times-World Corp.</i> , 226 VA 185, September 9, 1983. |
| 1989 | c. 538 | State public bodies authorized to conduct two-year pilot program (expiring July 1, 1991) for electronic communication meetings in accordance with statutorily mandated procedures; such meetings for political subdivisions and local public bodies prohibited. (§ 2.1-343.1) | |
| 1991 | c. 473 | Two-year pilot program expanded to three-year program, expiring July 1, 1992 (§ 2.1-343.1) | |
| 1992 | c. 153 | Authorization for state public bodies to conduct electronic communication meetings made permanent (i.e., three-year sunset repealed). (§ 2.1-343.1) | |
| 1993 | c. 270 | Clarification of application of law (i.e., what public bodies may conduct electronic communication meetings. (§ 2.1-343.1) | |
| 1995 | c. 278 | Language "Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation" added. (§ 2.1-343.1) | |
| 1996 | c. 289 | Requirement for quorum physically assembled at one location added. (§ 2.1-343.1) | |
| 1999 | c.703/726 | Technical changes as result of 1999 rewrite of FOIA. (§ 2.1-343.1) | Recommendation of the HJR 187/501 Joint Subcommittee Studying FOIA |
| 2001 | c. 844 | Technical changes as result of Title 2.1 revision into Title 2.2. (§ 2.2-3708) | No substantive changes made; renumbering of existing Code sections in Title 2.2 |
| 2003 | c. 981/102 | Technical changes as result of creation of the Virginia Information Technologies Agency (VITA). (§ 2.2-3708) | |
| 2005 | c. 352 | Substantive rewrite of § 2.2-3708 to relax procedural requirements | Recommendation of FOIA Council and JCOTS |

1 Confidential proprietary records...(i) voluntarily provided by a private entity pursuant to a proposal filed with a public entity or an affected local jurisdiction under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.), pursuant to a promise of confidentiality... , (ii) used by the responsible public entity or affected local jurisdiction for purposes related to the development of a qualifying transportation facility or qualifying project; and (iii) memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. (Emphasis added).

2 [A]nd memoranda, working papers or other records related to proposals filed under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002, where, if such records were made public, the financial interest of the public or private entity involved with such proposal or the process of competition or bargaining would be adversely affected. (Emphasis added).

3 That the Chairmen of the Senate and House General Laws Committees shall convene a working group of representatives of public and private entities to revise the current model guidelines to incorporate amendments to the Public Private Education Facilities and Infrastructure Act of 2002 in accordance with this act. The group shall make its recommendations available to the responsible public entities by September 30, 2005.